No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause precludes a federal agency from sanctioning an employee for making false statements to the agency regarding allegations that the employee had engaged in employment-related misconduct.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties to the proceedings in the Federal Circuit were Jeanette M. Walsh, Michael G. Barrett, Jerome K. Roberts, Sharon Kye, and the Merit Systems Protection Board.

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The Acting Solicitor General, on behalf of James B. King, the Director of the Office of Personnel Management, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit in these cases.

OPINIONS BELOW

The decision of the court of appeals in *King* v. *Erickson* (App., *infra*, 1a-23a) is reported at 89 F.3d 1575. The decision of the court of appeals in *King* v. *McManus* (App., *infra*, 24a-28a) is unpublished. The

decision of the Merit Systems Protection Board (MSPB) in *Walsh* v. *Department of Veterans Affairs* (App., *infra*, 29a-49a) is reported at 62 M.S.P.R. 586. The decision of the MSPB in *Erickson* v. *Department of the Treasury* (App., *infra*, 50a-58a) is reported at 63 M.S.P.R. 80. The decision of the MSPB in *Kye* v. *Defense Logistics Agency* (App., *infra*, 59a-69a) is reported at 64 M.S.P.R. 570. The decision of the MSPB in *Barrett* v. *Department of the Interior* (App., *infra*, 70a-96a) is reported at 65 M.S.P.R. 186. The decision of the MSPB in *McManus* v. *Department of Justice* (App., *infra*, 97a-105a) is reported at 66 M.S.P.R. 586.

JURISDICTION

The judgment of the court of appeals in *King* v. *Erickson* was entered on July 16, 1996. The judgment of the court of appeals in *King* v. *McManus* was entered on July 22, 1996. The petitions for rehearing in both cases were denied on November 4, 1996. App. *infra*, 106a-109a. On January 27, 1997, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law."

STATEMENT

These two cases arise from a total of five separate disciplinary proceedings against government employees. Each employee appealed his or her discipline to the Merit Systems Protection Board (MSPB). In

each case, the MSPB upheld an underlying charge of misconduct but reversed a charge that the employee had made false statements regarding the misconduct. In light of that reversal, the MSPB also mitigated the sanction imposed in each case. The Federal Circuit affirmed each of those decisions.

1. a. *Walsh.* Respondent Jeanette Walsh was employed as a Social Services Assistant at a medical center operated by the Department of Veterans Affairs in St. Cloud, Minnesota. She was charged with having sexual relations with a patient and other misconduct. App., *infra*, 2a. An administrative judge found that the charges had not been proven. *Id.* at 30a. The MSPB reversed in part, finding that, "while employed as a social services assistant, [Walsh] engaged in sexual relations with an alcohol-dependent patient at the agency medical center." *Id.* at 41a. The MSPB found that the relations began when the patient was an inpatient, as early as September 1988, and continued after he became an outpatient in November 1988. *Id.* at 34a-37a. The MSPB noted that her misconduct "was intentional and continued for some 18 months." *Id.* at 42a.

Walsh was also charged with making false statements concerning her relationship with the patient, a charge that the administrative judge affirmed. That charge was based on inconsistent statements Walsh had given to her employer. In a December 1988 meeting with a supervisor, Walsh had acknowledged having an intimate relationship with the patient at that time. App., *infra*, 2a. Later, in a 1991 affidavit, Walsh stated that during the December 1988 meeting she had denied having an intimate relationship with the patient. *Ibid.* Moreover, she consistently stated that she had not had any relationship with the patient

while he was an inpatient—*i.e.*, during the period from April 1988 through November 1, 1988. *Id.* at 3a.

The MSPB did not dispute that Walsh had made false statements regarding her misconduct. Relying on a new reading of the Federal Circuit's decision in *Grubka* v. *Department of the Treasury*, 858 F.2d 1570, 1475 (1988), however, the MSPB held that an agency may not "separately charge an employee with misconduct and making false statements or a similar offense regarding the alleged misconduct." App., *infra*, 41a. That result was necessary, in the MSPB's view, to protect the employee's "due process right to have an opportunity to be heard on a charge, and not to have a falsification type charge automatically sustained by virtue of the sustaining of an underlying charge." *Id.* at 40a. For the same reason, the MSPB held that Walsh's false statements could not be considered as aggravating factors that would increase the penalty imposed on Walsh for the charge of misconduct the MSPB sustained. *Id.* at 42a. Reviewing the sanction imposed on Walsh in light of its reversal of the falsification charge, the MSPB substituted a 90-day suspension for the penalty of removal that the agency had imposed.

Chairman Erdreich filed a concurring opinion. App., *infra*, 45a-49a. In his view, the principle that "an employee may give an untrue denial statement in response to an agency investigation * * * without the possibility of discipline for that statement * * * seems to conflict with several mandates that require a federal employee to be truthful in dealings with his federal employer." *Id.* at 45a. That leads to the "anomalous result that an employee may be required to respond to an agency inquiry, but may not be required to respond truthfully." *Id.* at 46a. It also

"give[s] federal employees a privilege not accorded to ordinary citizens who 'may decline to answer the question, or answer it honestly, but [who] cannot with impunity knowingly and willfully answer with a falsehood.'" *Id.* at 46a-47a (quoting *Bryson* v. *United States*, 396 U.S. 64, 72 (1969)). Expressing his "concerns about how this decision * * * affects the standards of employee conduct basic to the ethical underpinnings of our federal civil service," *id.* at 49a, Chairman Erdreich nonetheless concurred on the ground that *Grubka* and a later Federal Circuit decision compelled that result. See *ibid.*

b. *Erickson.* Respondent Lester Erickson, Jr., was employed as a Supervisory Police Officer with the Bureau of Engraving and Printing. The agency had apparently been suffering from a series of "Mad Laugher" harassing telephone calls, in which someone would anonymously call agency employees during work hours, laugh continuously, and then hang up. Erickson was charged with having encouraged an employee of an agency contractor to make a "Mad Laugher" call to an agency police officer. App., *infra*, 5a. The MSPB sustained that charge of misconduct. *Id.* at 7a, 54a-55a.

Erickson was also charged with making a false statement in a matter of official interest, in violation of the agency's minimum standards of conduct. App., *infra*, 52a. That charge was based on Erickson's responses to a series of questions posed by an agency investigator regarding the "Mad Laugher" calls. In particular, Erickson had stated that he "never participated" in the calls; that he "d[id] not know who" was making the calls; and that he "do[es] not know the true identification of the 'Mad Laugher.'" *Id.* at 5a-6a, 52a. Erickson added that "[i]n my opinion it is

95% of the police unit [and] also possibly personnel in Production." *Id.* at 6a, 52a-53a.

Based on its decision in *Walsh*, the MSPB did not sustain the false statement charge, stating that "[a]n agency may not charge an employee with falsely denying misconduct when it is separately charging the employee with the underlying misconduct." App., *infra*, 53a. The MSPB accordingly mitigated the sanction of removal to a 15-day suspension. *Id.* at 54a-55a.

c. *Kye*. Respondent Sharon Kye was employed as a Supervisory General Supply Specialist for the Defense Logistics Agency. She was charged with failing to safeguard a government Diners Club credit card, failing to follow instructions for reporting loss, theft, or compromise of the card, and misuse of the card. The card was used on more than 29 different occasions during March 1993 to make improper cash withdrawals from ATM machines amounting to more than $2,000. Initial Decision at 2. In addition, Kye used the card for the rental of a motel room on March 31, 1993, and the agency produced the motel registration form signed by Kye. *Id.* at 9. Kye was not authorized to use the card at all during that period, because she was not on official travel. *Id.* at 2. The MSPB sustained the charges of misconduct. App., *infra*, 59a-67a.

Kye was also charged with providing false information in an official investigation. She repeatedly maintained that she had not herself used the card for any of the improper charges. In addition, she told an agency investigator on one occasion that she had lost possession of the card while it was being misused, but that she had torn it up as soon as she regained possession of it, on April 2 or 3, 1993. Initial Decision

at 5. At a later interview, she stated that she did not have possession of the card in early April 1993, but that she had in fact torn it up during the middle of April. *Id.* at 6. In fact, the evidence showed that she had the card in her possession on March 31, when she used it at the motel. *Id.* at 9.

Based on its decision in *Walsh*, the MSPB did not sustain the false statement charge. App., *infra*, 63a. The MSPB accordingly mitigated the sanction of removal to a 45-day suspension. *Id.* at 63a-64a. Member Amador dissented from the decision to mitigate the sanction, on the ground that the charges that had been sustained were sufficient to warrant the sanction of removal. *Id.* at 67a-69a.

d. *Barrett and Roberts*. Respondents Michael Barrett and Jerome Roberts were employed as Soil Scientists by the Department of the Interior. In June 1988, they left their duty stations in a government pickup truck to build a fish pond in the backyard of their supervisor's house. They did not take leave for the time they were not on duty. App., *infra*, 9a, 71a. As a result of that incident, they were charged with making a false claim on their time and attendance reports when they represented that they had been on duty during the period that they had been assisting with the fish pond. *Id.* at 85a.

Barrett and Roberts also were charged with misrepresentation or concealment of a material fact in connection with an investigation. When the agency personnel officer had inquired about the alleged misconduct, "Roberts stated in response to the inquiry that he did not remember anything about the building of a fish pond, while Barrett stated that he only worked on the fish pond on his own time." App., *infra*, 86a. The administrative judge had found that those

statements were false. In addition, Barrett and Roberts were charged with failing to report an act of fraud, waste, and abuse "when they failed to disclose to agency officials that [their supervisor] did not charge them leave for the time that they worked on the fish pond." *Ibid.* The administrative judge sustained that charge as well.

Based on its decision in *Walsh*, the MSPB did not sustain the false statement charge. App., *infra*, 86a-87a. In addition, the MSPB held that for similar reasons the charge of failure to report an act of fraud also could not be sustained. *Id.* at 87a. In the MSPB's view, respondents' disclosure of the fraud "would have necessitated implicating themselves in the misconduct of filing a false time and attendance report." *Ibid.* The MSPB concluded that "[a] charge based on such a requirement of self-implication is contrary to * * * *Walsh*" and therefore had to be reversed as well. *Ibid.* Accordingly, the MSPB substituted a letter of reprimand for the demotions and 30-day suspensions the agency had imposed on Barrett and Roberts. *Id.* at 71a, 88a-89a. Member Amador dissented in part, stating that the appropriate punishment in his view was a 30-day suspension. *Id.* at 91a-96a.

e. *McManus.* Respondent Harry McManus was employed as a Supervisory Correctional Officer with the Department of Justice. He was charged with conduct unbecoming a supervisor, based on various sexual comments he had made to a female correctional officer. For example, he had referred to her bra size, had asked her about her preferred sexual positions, told her he had a "bulge" in his pants when thinking about that subject, and asked whether the female officer could see how much she excited him. App., *infra*, 98a. The MSPB affirmed the administrative judge's findings that McManus had engaged in misconduct. *Id.* at 97a-105a.

McManus also was charged with making false statements during the agency's investigation. During an initial interview, McManus had denied having told the female officer that he was disappointed she had not called one evening when they were on duty together; he denied having stated that "he would have [the female officer] relieved so that she could come over to [McManus's post] and tease him more"; he "flatly denied discussing the subject of preferred sexual positions" with the female officer; and he "denied that he told [the female officer] that he had a bulge (in his pants) while talking with her." App., *infra*, 25a-26a. In a later interview he admitted that in fact he made all of those statements. *Ibid.*

Based on its decision in *Walsh*, the MSPB did not sustain the false statement charge. App., *infra*, 100a. The agency argued that the MSPB should nonetheless take McManus's false statements into account in assessing his credibility when he denied that the female officer had ever specifically discouraged his remarks. That testimony contradicted statements by the female officer that, although she initially participated in the sex-related joking, she later told McManus to stop. The MSPB, however, categorically "decline[d] to consider [McManus's] false statement in analyzing the penalty issue"—even for such impeachment purposes. *Ibid.* The MSPB accordingly substituted a 14-day suspension for the demotion the agency had imposed on McManus. *Id.* at 103a.

2. In its decision in *Erickson*, the court of appeals considered appeals from the MSPB's decisions regarding Erickson, Walsh, Barrett and Roberts, and

Kye. App., *infra*, 1a-23a. Relying on "procedural due process concerns," *id.* at 20a, the court held "that an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge," *id.* at 21a.

The court initially noted "that the government employees here had a protected property interest in their employment," App., *infra*, 10a, and that they were therefore entitled both under applicable statutes and under the Due Process Clause to notice and a meaningful opportunity to be heard before adverse action is taken against them, *id.* at 10a-11a (citing 5 U.S.C. 7513(b)). The court agreed with the MSPB that its earlier *Grubka* decision was correctly interpreted to hold "that an employee's denial of the factual basis of a [misconduct] charge may not be used as the basis for a falsification charge." *Id.* at 15a.

The court also rejected the suggestion that there should be any distinction between denying an allegation of misconduct and denying the facts underlying the allegation. In the court's view, "[a]llowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges." App., *infra*, 16a. The court noted that "employees might be reluctant to deny charges for fear that their denials would be construed as denials of facts, which in OPM's view would subject them to an additional falsification charge." *Ibid.* The court also stated that if falsification charges were permitted in this context, employees could be "coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting

from a falsification charge." *Id.* at 16a-17a. In the court's view, that "would create a 'chilling effect' on their clear right to defend themselves, a 'Catch-22' situation for employees that is inconsistent with the due process right provided by federal law to enable them to defend themselves." *Id.* at 17a.

The court stated that its holding did not "mean * * * that an employee has a right to lie or affirmatively mislead an agency engaged in an investigation." App., *infra*, 17a. The court stated that "[b]eyond a denial of a charge or of the factual accusations supporting a charge, an employee may not make up a false story, or tell 'tall tales' in order to defend against a charge." *Ibid.* The court also stated that "when the agency is in an investigatory mode, prior to charges having being brought," and "when investigations are conducted concerning the conduct of other employees, false statements are actionable." *Id.* at 18a.

Applying the above principles, the court of appeals affirmed the MSPB's decisions in each of the cases before it. In Walsh's case, the court held that the employee's statements were "mere denials of having an intimate relationship with the patient" and were therefore insufficient to support a false statement charge. App., *infra*, 22a. In Erickson's case, the court affirmed the MSPB's decision because the employee's denials of having knowledge of or participating in the "Mad Laugher" calls "were denials of having engaged in such conduct" and "were thus not otherwise false." *Ibid.* In Kye's case, the court held that the employee's denials of having misused the credit card and her other statements "in effect were * * * denials and were not actionable false statements." *Id.* at 23a. Finally, in Barrett's and

Roberts' case, the court held that the employees' statements that "they knew nothing of the events in question" were not actionable because they were "in essence * * * denial[s] and w[ere] not otherwise false." *Ibid.*

3. Eight days after its decision in *Erickson*, the Federal Circuit decided *McManus* in an unpublished decision. App., *infra*, 24a-28a. The court relied on its decision in *Erickson* to hold that the employee's denials of having made sexual comments to the female officer "were within the range of denials that must be permitted in order to make meaningful the right to respond to charges." *Id.* at 28a. Accordingly, the court concluded that "the board did not err in reversing the falsification charge against McManus." *Ibid.*

REASONS FOR GRANTING THE PETITION

Before the government may deprive one of its employees of a protected property interest in employment based on an allegation of misconduct, the employee must ordinarily be given notice and an opportunity to be heard on the charges. The employee's right to a meaningful opportunity to be heard, however, has never been understood to include the right to make false statements with impunity during an agency investigation. To the contrary, the court of appeals' conclusion is inconsistent with settled principles that the Constitution contains no right to lie. Because the court of appeals' decision threatens to do substantial damage to the ethical underpinnings of the civil service and represents an unjustifiable judicial intrusion into the proper scope of federal employee discipline, further review is warranted.

1. The basic holding of the court of appeals in these cases is unequivocal: "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge." App., *infra*, 21a. That ruling creates a right to lie for federal employees suspected of on-the-job wrongdoing. Although the court of appeals recognized that "the agency is entitled to truth-telling" in some circumstances, *id.* at 18a, the holding of the court of appeals is that federal agencies are not so entitled when their employees face allegations of misconduct.

The court of appeals accorded an extraordinary breadth of protection to the right that it created. The Federal Circuit held not only that the employee's false statements may not serve as a distinct ground for discipline, but also that "[d]enials of charges and related facts may not be considered in determining a penalty" for the underlying misconduct. App., *infra*, 21a. Thus, if the employee's misconduct is proven, the agency may not take the employee's false statements into account in settling upon the appropriate sanction; the agency must treat the employee as if the employee had been entirely honest and forthcoming throughout the investigation. Moreover, although an employee who makes false statements regarding the misconduct of others apparently remains subject to discipline, see *id.* at 18a, an employee who takes the same action to cover up his own misconduct cannot be made to suffer any consequences on that account.

2. The Federal Circuit asserted that the protection it was granting to false statements was limited. The court stated that its holding "does not mean * * * that an employee has a right to lie or affirmatively mislead an agency engaged in an investiga-

tion." App., *infra*, 17a. The court added that "an employee may not make up a false story, or tell 'tall tales' in order to defend against a charge," and that "falsehoods which go beyond denial and defense are actionable by an agency as falsification." *Ibid.* Those statements do not, however, mitigate the untoward consequences of the court's rule.

First, the Federal Circuit's assurances that an agency may still sanction "affirmative[] mislead[ing]" or "falsehoods which go beyond denial and defense" are of limited value in light of the court's treatment of the cases before it. Respondent Erickson, for example, not only denied having made the "Mad Laugher" calls, but added that "[i]n my opinion it is 95% of the police unit [and] also possibly personnel in Production" who made the calls. App., *infra*, 6a. Respondent Kye falsely stated that she did not have possession of the credit card during the time it had been misused and that she had torn the credit card up as soon as she regained possession of it, on April 2 or 3, 1993. She then stated (again falsely) that she had in fact torn it up during the middle of April. All of those statements were more than mere "denials" and amounted to efforts to "affirmatively mislead" the agency. Yet the Federal Circuit nonetheless held that the Constitution precluded the agencies involved from bringing charges based on those false statements or taking the false statements into account in any way in determining the appropriate discipline.

Second, the line between "affirmative misstatements" or "tall tales," on the one hand, and mere "denial and defense," on the other, is inherently unstable. Government agencies as employers will generally ask their employees a wide range of questions regarding their on-the-job activities, particularly when misconduct is suspected. Such questions frequently require an employee who wants to retain credibility while falsely denying misconduct to make other false statements about related matters as well. In those circumstances, protection for the false denials necessarily shades over into protection for the affirmative misstatements.[1]

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[1] The rule adopted by the Federal Circuit is similar in some respects to the so-called "exculpatory no" doctrine, which has been used by some courts of appeals to preclude the application of the federal criminal false statement statute, 18 U.S.C. 1001, to mere exculpatory denials of wrongdoing. But see *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1044-1045 (5th Cir. 1994) (en banc) (rejecting doctrine); *United States* v. *Wiener*, 96 F.3d 35, 37 (1996) (same), opinion supplemented on other grounds, Nos. 95-1294, 95-1403, 95-1597, 1996 WL 531009 (2d Cir. Sept. 16, 1996); cf. *United States* v. *LeMaster*, 54 F.3d 1224, 1227-1230 (6th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996). The experience of the courts that have applied that doctrine is instructive. Although the courts that accept the doctrine routinely recite that the doctrine protects only exculpatory denials and does not extend to affirmative misstatements, the lines they have attempted to draw between the two categories of false statements are not stable. Compare, *e.g.*, *United States* v. *Moore*, 27 F.3d 969, 979-980 (4th Cir.) (holding that "exculpatory no" doctrine did not protect a defendant's denials that a signature was his, that he had prepared certain tax returns, and that he had ever prepared similar tax returns), cert. denied, 115 S. Ct. 459 (1994), and *United States* v. *Holmes*, 840 F.2d 246, 249 (4th Cir.) (holding that signing a document with a false name is not protected by "exculpatory no" doctrine), cert. denied, 488 U.S. 831 (1988), with *United States* v. *Myers*, 878 F.2d 1142, 1143, 1144 (9th Cir. 1989) (holding that "exculpatory no" doctrine protected a defendant who "concocted a story about the [defendant] losing his contact lenses while in flight and, as a result, inadvertently flying into prohibited airspace") and *United States* v. *Equihua-Juarez*, 851 F.2d 1222, 1224-1227 (9th Cir. 1988) (holding that "exculpatory no" doc-

Third, and perhaps most important, even if the Federal Circuit's rule could effectively be limited in the ways suggested by that court, the rule would still confer a broad and unwarranted immunity on federal employees who make false statements. Under any version of the Federal Circuit's rule, federal employees would have substantial latitude to make false statements to their agencies about their on-the-job conduct. Indeed, the recognition of even a limited constitutional right to deceive represents an unwarranted intrusion on the discretion of the government to determine under what circumstances on-the-job misconduct by government employees—including on-the-job dishonesty—should lead to disciplinary action.[2]

3. The court of appeals squarely rested its holdings on the Due Process Clause of the Fifth Amend-

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trine protects defendant who provided a false name to federal investigators).

[2] In a further effort to limit its ruling, the Federal Circuit stated that "when the agency is in an investigatory mode, prior to charges having been brought, the agency is entitled to truth-telling by its employees." App., *infra*, 18a. In each of the cases at issue here, however, the employee made some or all of the false statements in the course of an agency investigation, *i.e.*, before a notice of adverse action under 5 U.S.C. 7513(b)(1) was sent to the employee. Indeed, the Federal Circuit's own descriptions of several of the false statements essentially acknowledge as much. See App., *infra*, 5a (Erickson made false statements "when responding to a list of questions from an agency investigator"), 9a (Barrett and Roberts "provided false information in response to the agency's inquiry"), 25a (McManus made false statements "when McManus was interviewed during the agency's investigation"). Nonetheless, the court held that each of the employees could not be disciplined for the false statements.

ment. The court began its discussion in *Erickson* by quoting that Clause. See App., *infra*, 10a. The court then cited to *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 546 (1985), a leading case from this Court holding that the Due Process Clause grants employees who have property interests in their government employment a meaningful opportunity to be heard before they may be deprived of those interests. See App., *infra*, 11a. Throughout its opinion, the court relied on the constitutional right to "a meaningful opportunity to respond," *id.* at 16a (emphasis omitted), and "the due process right provided by federal law," *id.* at 17a, as the bases for its rule.[3] Although the court did in one place quote the statute providing employees charged with misconduct with "a reasonable time * * * to answer orally and in writing," see 5 U.S.C. 7513(b)(2), the court did so simply to note that "compliance with the[] [statutory] procedures satisfies the minimum due process requirements to which the employee is entitled." App., *infra*, 11a. The court did not suggest that the statute itself grants an employee a right to make false denials, and nothing in the statutory language would support creation of such a right.

The court of appeals' derivation of a right to make false statements from constitutional procedural due process principles has no foundation in the decisions of this Court. No decision of this Court addressing the scope or nature of the due process right to a

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[3] See App., *infra*, 17a ("meaningful opportunity to respond"), 19a ("due process requires that an employee be allowed to deny both a charge and the underlying facts without being subject to a falsification charge"), 20a ("the holding in *Grubka* was based on procedural due process concerns").

meaningful opportunity to be heard has suggested that it includes the right to make false statements with impunity.[4] In *Loudermill*, for example, the Court discussed "'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" 470 U.S. at 542 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971)). Nothing in *Loudermill* suggests that the right to a hearing extends to the right to make false statements at such a hearing. Nor does any other case from this Court suggest that the purely procedural right to a meaningful opportunity to be heard includes a substantive right limiting the government's ability to sanction employees who make false statements.[5]

4. The Federal Circuit's decision conflicts with decisions of this Court making clear that the Constitution does not recognize a right to lie and that an individual who chooses to answer questions by making false statements may be made to suffer penalties on that account. In *Bryson* v. *United States*, 396 U.S. 64 (1969), the Court stated the governing legal principle:

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[4] See, *e.g.*, *Washington* v. *Harper*, 494 U.S. 210, 228-236 (1990); *FDIC* v. *Mallen*, 486 U.S. 230, 240-248 (1988); *Hewitt* v. *Helms*, 459 U.S. 460, 472-477 (1983); *Vitek* v. *Jones*, 445 U.S. 480, 494-496 (1980); *Mathews* v. *Eldridge*, 424 U.S. 319, 339-349 (1976); *Goss* v. *Lopez*, 419 U.S. 565, 577-584 (1975); *Wolff* v. *McDonnell*, 418 U.S. 539, 563-572 (1974); *Goldberg* v. *Kelly*, 397 U.S. 254, 266-271 (1970); *Greene* v. *McElroy*, 360 U.S. 474, 496-497 (1959); *Morgan* v. *United States*, 304 U.S. 1, 14-15, 18-22 (1938)

[5] The Court recognized that in some circumstances, "a post-deprivation hearing will satisfy due process requirements." 470 U.S. at 542 n.7.

"Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Id.* at 72 (footnote omitted). The court explained that "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Ibid.* See also *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911) (Fifth Amendment "does not endow the person who testifies with a license to commit perjury").

Although the Court enunciated those principles in a criminal case, they apply equally in this context. In one respect, government employees are in a different position from most individuals in a criminal setting who may assert their privilege against compelled self-incrimination in response to questions; government employees have an obligation to cooperate with their employer and therefore do not have the option of simply remaining silent. See, *e.g.*, *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973). But that difference does not suggest that government employees should be given a compensating right to respond to questions with false statements. If an employee does not want to answer questions honestly regarding his on-the-job misconduct—*i.e.*, if the employee is unable to fulfill a basic condition of the employee-employer relationship—the employee may refuse to answer and suffer whatever penalties ensue. In any event, even if the federal employee were viewed as having been compelled to answer questions, that would not affect the analysis. In the criminal context, too, even an individual who is compelled to provide the government information—on a form required by the National Labor Relations Board, as in *Bryson*, on a wagering tax form, as in *United States* v. *Knox*, 396

U.S. 77, 79 (1969), or because he has been granted use immunity for his testimony, see *United States* v. *Apfelbaum*, 445 U.S. 115, 126-127 (1980)—"must testify truthfully or suffer the consequences." *United States* v. *Havens*, 446 U.S. 620, 626 (1980).

In *United States* v. *Dunnigan*, 507 U.S. 87 (1993), this Court held that Sentencing Guidelines Section 3C1.1, which requires an enhancement of the defendant's sentence if the defendant commits perjury at trial, does not "undermine[]" the constitutional right to testify. 507 U.S. at 96. The Court noted that the "right to testify does not include a right to commit perjury." *Ibid.* (citing *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986); *United States* v. *Havens*, 446 U.S. at 626; *United States* v. *Grayson*, 438 U.S. 41, 54 (1978)). The Court also noted that the Guidelines provision does not "distort[] [the defendant's] decision whether to testify or remain silent," since there is no "categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *Ibid.*

The right to testify addressed by the Court in *Dunnigan* has its roots in large part in the same due process principles that produce the right to a meaningful opportunity to be heard relied upon by the Federal Circuit in this case. See *Rock* v. *Arkansas*, 483 U.S. 44, 51 & n.9 (1987). Consequently, the principle of *Dunnigan* that the right to testify does not include a right to testify falsely conflicts with the Federal Circuit's holding that the right to a meaningful opportunity to be heard *does* include the right to make false statements. Indeed, the specific holding of *Dunnigan* that a defendant's sentence may be enhanced for false testimony is irreconcilable with

the Federal Circuit's conclusion that "one can hardly justify enhancing a misconduct penalty because of * * * falsification." App., *infra*, 21a.[6]

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[6] The court of appeals' attempts to distinguish *Dunnigan* are unavailing. The court first stated that *Dunnigan* "only dealt with enhancement of a sentence in a criminal context, where there is a heavier burden of proof than agencies have in proving charges of falsification against employees." App., *infra*, 21a. That account is wrong. The burden of proof in the federal criminal *sentencing* context is ordinarily precisely the same preponderance-of-the-evidence standard that applied to the charges of falsification in these cases. See *United States* v. *Watts*, 117 S. Ct. 633, 637 (1997) (per curiam) (citing Sentencing Guidelines § 6A1.3 commentary). In any event, the heavier burden of proof in criminal cases is a reflection of the fact that the defendant's liberty—and not merely a property interest—is at stake. Even if criminal sentencing determinations had to be supported by a higher burden of proof, that would have no bearing on the question whether a defendant—or, in this case, a government employee—may suffer additional sanctions for making false statements.

The court of appeals also stated that "the crime of perjury consists of lying under oath, a much more serious offense than violation of 5 C.F.R. § 5.4 [which requires federal employees to cooperate with investigations and to testify truthfully], thereby justifying a penalty beyond that levied on the basic offense." App., *infra*, 21a. Under *Dunnigan*, however, a federal court may impose a longer sentence, thereby depriving a defendant of liberty, on account of false statements made at trial that materially affect the prosecution. If the Due Process Clause does not forbid imposition of that consequence on those who testify falsely at trial, it surely does not prohibit the much less severe sanctions at issue here. Moreover, the Guidelines provision at issue in *Dunnigan* permits an enhancement not only for perjury at trial, but also for unsworn false statements that obstruct an investigation, similar to the false statement sanctions the Federal Circuit held to be unconstitutional in this case. See Guidelines § 3C1.1 & Application Note 3(g) (enhancement applies to obstruction "during the *investigation*

5. The rule adopted by the Federal Circuit in these cases is unprecedented; we have been unable to find any case from any other court recognizing a constitutional right to make knowing and intentional false statements with impunity. The Federal Circuit generally has the final say on employee disciplinary matters. See 5 U.S.C. 7513(d) (employees may appeal adverse personnel actions to the MSPB); 5 U.S.C. 7703 (MSPB decisions on employee disciplinary matters appealable to Federal Circuit). Accordingly, the government is unlikely to have the opportunity to litigate the issues in this case before any other court of appeals. See generally *United States* v. *Fausto*, 484 U.S. 439, 446-447 (1988). Moreover, since the Federal Circuit derived its rule from the Constitution, it presumably cannot be altered through the issuance of regulations or even through amendment of the civil service statutes. Because the Federal Circuit's decisions in these cases conflict with decisions of this Court and impose unjustified constitutional restraints on the government's ability to manage the civil service system effectively, review by this Court is warranted.

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* * * of the instant offense," including "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 95-3745 and 95-3746

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., RESPONDENT

and

JEANETTE M. WALSH, RESPONDENT

and

MICHAEL G. BARRETT AND JEROME K. ROBERTS, RESPONDENTS

and

SHARON KYE, RESPONDENT

and

MERIT SYSTEMS PROTECTION BOARD, RESPONDENT

[Decided July 16, 1996]

Before: RICH, LOURIE, and RADER, *Circuit Judges.*

LOURIE, *Circuit Judge.*

The Director of the Office of Personnel Management ("OPM") petitions for review of (1) the final decision of the Merit Systems Protection Board holding that an agency may not charge an employee both with misconduct and with making false statements regarding the alleged misconduct, *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), and (2) the final decisions of the board reversing falsification charges based on its holding in *Walsh. Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994); *Kye v. Defense Logistics Agency*, 64 M.S.P.R. 570 (1994); *Barrett v. Department of the Interior*, 65 M.S.P.R. 186 (1994). We affirm.

BACKGROUND

A. *Walsh*

The Department of Veterans Affairs employed Jeanette M. Walsh as a Social Services Assistant at the agency's medical center in St. Cloud, Minnesota. The agency removed her for engaging in a sexual relationship with a patient, engaging in improper financial dealings with patients, and providing false statements to the agency regarding her alleged relationship with a patient. In particular, Walsh provided inconsistent statements regarding when her relationship with the patient began and how long it lasted. In a December 1988 meeting with her supervisor, Walsh acknowledged that she was having an intimate relationship with the patient, who at the time was no longer an in-patient. However, in a December 1991 affidavit, she averred that during the December 1988 meeting with her supervisor she accurately denied having an intimate relationship with the patient at that time. In spite of this inconsistency, she always stated that she did not have an

intimate relationship with the patient while he was an in-patient at the agency's facility from April 1988 until November 1, 1988.

In an initial decision, an administrative judge (AJ) found that the agency failed to prove the first two charges. Based on his findings regarding these charges, the AJ did not uphold the third charge. The agency petitioned for review by the full board. The board reversed the AJ's finding that the agency had failed to prove the first two charges, but held that the agency improperly charged Walsh with making false statements regarding the alleged misconduct. Relying on our decision in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1575 (Fed. Cir. 1988), the board held that an agency may not charge an employee both with misconduct and with making false statements regarding the alleged misconduct. The board recognized that certain of its prior decisions had held to the contrary. *Walsh*, 62 M.S.P.R. at 594 (citing *Greer v. United States Postal Serv.*, 43 M.S.P.R. 180, 184-85 (1990); *Kane v. Department of Veterans Affairs*, 46 M.S.P.R. 203, 209 (1990); *Sterling v. Department of Defense*, 46 M.S.P.R. 177, 185-86 (1990); *Hornbuckle v. Department of the Army*, 45 M.S.P.R. 50, 54 n.2 (1990); *Hill v. Department of the Army*, 44 M.S.P.R. 607, 611-12 (1990)). However, the board also determined that those decisions relied upon a faulty analysis of *Grubka*. In *Grubka*, we stated that a falsification charge based upon an employee's denial of misconduct "has no substance, is frivolous, and the decision of the AJ sustaining it is not supported by substantial evidence and is erroneous as a matter of law . . . ." *Grubka*, 858 F.2d at 1575. The board in *Walsh* reasoned that, because we used the conjunction "and" in our holding

in *Grubka*, two findings were made, one of which was that the charge was erroneous as a matter of law. According to the board, *Grubka* thus supports the proposition that a separate charge of making false statements regarding alleged misconduct is erroneous as a matter of law and is therefore improper.

The board also stated that in *Greer* and its progeny, it mischaracterized the due process concerns enunciated in *Grubka*. According to the board, these concerns were not, as stated in previous board decisions, based upon the Fifth Amendment right against compulsory self-incrimination but, rather, were based upon the due process right to be heard on a charge and to not have a falsification charge automatically sustained on the ground of sustaining the related misconduct. The board also determined that it erred in *Greer* when it stated that, as an alternative to providing false statements during an agency investigation, an employee may simply refuse to answer questions. According to the board, such a statement was contrary to precedential board decisions and Federal Circuit precedent; an employee may be removed solely for refusing to answer questions during an agency investigation if she is warned that she may be removed for not answering and that her statements cannot be used against her in a criminal prosecution. *See Weston v. United States Dep't of Hous. and Urban Dev.*, 724 F.2d 943, 949 (Fed. Cir. 1983); see also *Haine v. Department of the Navy*, 41 M.S.P.R. 462, 469 (1989). Accordingly, the board overruled *Greer* and its progeny to the extent that their holdings were contrary to *Grubka*.

The board mitigated Walsh's penalty to a 90-day suspension. In determining the appropriate penalty, the board noted that it previously had held that an

employee's false statements may be considered in determining a maximum reasonable penalty for misconduct. However, it stated that consideration of false statements in determining a penalty would conflict with the holding in *Grubka* and would in effect penalize an employee for denying a charge. Accordingly, the board held that an employee's alleged false statements in response to an agency inquiry may not properly be considered in determining a penalty.

B. *Erickson*

The Department of the Treasury employed Lester R. Erickson as a Supervisory Police Officer with the Bureau of Printing and Engraving. The agency removed Erickson for conduct unbecoming a supervisor and for making false statements in matters of official interest. The first charge was based on the agency's allegation that Erickson encouraged an employee of an agency contractor to make a "mad laugher" telephone call to another agency police officer during duty hours. The "mad laugher" calls were calls to employees at their duty stations during which the caller would laugh continuously and then hang up without identifying himself or herself.

The falsification charge was based on Erickson's denials that he participated in the "mad laugher" calls. In particular, when responding to a list of questions from an agency investigator, he made the following allegedly false statements:

> Question 2: "Approximate the number of occasions you made 'Mad Laugher' calls and to whom by name?"
> Answer: "None."

Question 6: "Approximate time you quit participating in 'Mad Laugher' calls."
Answer: "I never participated."

Question 9: "Specifically, how many times did you ask your subordinates to cease the 'Mad Laugher' calls?"
Answer: "None, [b]ecause I do not know who is doing it."

Question 12: "Are you willing to specifically state all those that are participants in the 'Mad Laugher' telephone calls."
Answer: "No—I do not know the true identification of the 'Mad Laugher.' In my opinion it is 95% of the police unit [and] also possibly personnel in Production."

In an initial decision, an AJ upheld both charges. The agency provided a sworn statement and subsequent affidavit by the person who was allegedly encouraged by Erickson to make one of the "mad laugher" calls. The statement and affidavit affirmed the truth of the charges, and the AJ found them to be credible. The AJ also found that the agency had told Erickson to refrain from making "mad laugher" calls and that encouraging another to engage in such a prank was disruptive to the agency's mission. Further, based on the AJ's belief in the credibility of the statements in the affidavit, as well as affidavits of others, the AJ found that Erickson had knowledge of and participated in the "mad laugher" calls and that he made false statements when he denied such involvement. The AJ also held that Erickson had not established that the agency's action was based on an

alleged handicapping condition of alcoholism. Accordingly, the AJ upheld the penalty of removal.

Erickson petitioned for review by the full board. The board determined that his petition did not meet the criteria for review under 5 C.F.R. § 1201.115; however, it reopened the case on its own motion under 5 C.F.R. § 1201.117. The board upheld the misconduct charge. However, based on its *Walsh* decision, the board reversed the falsification finding, stating that the essence of the charge was Erickson's failure to admit that he participated in "mad laugher" calls, and that he was charged with encouraging another to make such a call, not for his own alleged participation, and that was a matter not within the agency's concern. The board mitigated the penalty to a 15-day suspension, stating that under its *Walsh* holding it would not consider Erickson's allegedly false statements in determining an appropriate penalty for the misconduct.

C. *Kye*

The Defense Logistics Agency employed Sharon Kye as a Supervisory General Supply Specialist at the Defense Distribution Depot in Norfolk, Virginia. The agency removed her for several offenses related to alleged misuse of a Diners Club card that the agency issued to her for use in official travel. The agency also charged her with providing false information in an official investigation based on her contradictory statements regarding her use of the card during the time in question.

In an initial decision, an AJ sustained most of the charges relating to Kye's alleged misuse of the card. The AJ also sustained the falsification charge, finding that Kye provided false information regarding her

control over the card during the time in question. In particular, she initially replied to the charges by stating that the card was missing from the drawer where she kept it during the period of its alleged misuse and that she tore it up when it reappeared. During another interview, she stated that she tore up the card about three weeks earlier. Later, however, she stated that she meant to say that she "confronted the problem" about three weeks earlier but did not regain control of the card until about two weeks later. In addition, the agency claimed that she used the card at a motel during the time in question, and it produced a copy of a signed registration form from the motel. Kye stated in response that, although the signature on the registration form resembled her own, she did not recall being at the motel. The AJ found that Kye's statements contained many improbabilities and inconsistencies. For example, the AJ found that in order to believe Kye's statements that she may have used the card, he would have had to disbelieve her statements that she lost control of the card. The AJ also found that she had not met her burden of proof on her affirmative defenses of discrimination for making a protected disclosure and for a handicapping condition. Accordingly, the AJ found that Kye provided false statements to the agency, and he upheld the penalty of removal.

Kye petitioned for review by the full board. The board analyzed her affirmative defense of handicap discrimination and found that it lacked merit. Based on its decision in *Walsh*, the board summarily reversed the falsification charge and mitigated the penalty to a 45-day suspension.

D. *Barrett and Roberts*

The Department of the Interior, Bureau of Indian Affairs, employed Michael G. Barrett and Jerome K. Roberts as Soil Scientists at the Natural Resources and Engineering Laboratory in Gallup, New Mexico. The agency alleged that they left work during duty hours to help their supervisor build a fish pond at his home. The agency charged them with making a false claim on a time and attendance report based on their 1.5 hours of claimed duty time when they were allegedly building the fish pond; failing to report an act of fraud, waste, and abuse consisting of their supervisor's alleged misconduct; and misrepresentation or concealment of a material fact in connection with an agency investigation. According to the agency, they provided false information in response to the agency's inquiry. Roberts stated that he did not remember building a fish pond, and Barrett stated that he only worked on the fish pond on his own time. The agency demoted both and suspended them for 30 days. In an initial decision, an AJ sustained all charges and upheld the penalties. With respect to the falsification charge, the AJ found that Barrett and Roberts stated in response to agency questionnaires that they knew nothing of the events in question. Based on the testimony of others, the AJ found by a preponderance of the evidence that Barrett and Roberts were at their supervisor's house during the time in question and therefore that their statements to the contrary were false.

Barrett and Roberts petitioned for review by the full board, which vacated and remanded the AJ's initial decision. On remand, the AJ upheld the agency's action, and Barrett and Roberts again peti-

tioned for review by the full board. Based on its decision in *Walsh*, the board reversed the holdings of falsification and of failing to report an act of fraud, waste, and abuse. According to the board, requiring Barrett and Roberts to report their supervisor's alleged misconduct would have necessitated implicating themselves in the misconduct of filing a false time and attendance report, and such self-implication was contrary to its holding in *Walsh*. The false time and attendance report charges were sustained; they are not before us in this appeal. The board also mitigated the penalties to letters of reprimand.

DISCUSSION

We may reverse a decision of the board only if it was arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1994); *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987).

Under the Fifth Amendment, "No person shall . . . be deprived of . . . property, without due process of law . . . ." U.S. CONST. amend. V. Procedural due process under the Fifth Amendment protects federal employees when they obtain a statutorily-created property interest in their employment. *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972) (stating that property interests are not created by the Constitution, but, rather, are created by existing rules or understandings). It is undisputed that the government employees here had a protected property interest in their employment. *See* 5 U.S.C. § 7513 (1994). Federal workers who meet the definition of "employee," 5 U.S.C. § 7511, are entitled to the following

procedures protecting their property interests in their continued employment:

An employee against whom an action is proposed is entitled to—

> (1) at least 30 days' advance written notice . . . stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> (3) be represented by an attorney or other representative; and
>
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. § 7513(b) (1994). Section 7513 also states that actions will be taken against an employee "only for such cause as will promote the efficiency of the service." *Id.* § 7513(a). When an agency brings charges against an employee, compliance with these procedures satisfies the minimum due process requirements to which the employee is entitled. The agency may then deprive the employee of his property interest in continued employment when he has been shown to have failed to perform his job properly or engaged in reprehensible conduct. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (stating that the essential requirements of due process are notice and a meaningful opportunity to respond). While it is clear that the procedures set out in the statute provide an employee with procedural due process, the question before us is whether doubling

up a misconduct charge with a charge of falsification in the course of the agency's investigation of the misconduct deprives the employee of the due process that the statute intends. We hold that it does.

OPM argues that the employees here were given all the procedural rights due them under 5 U.S.C. § 7513. OPM asserts, therefore, that it was not improper for the agencies to charge the employees with falsification based on their denials of facts related to the corresponding misconduct charges.

OPM argues that the statements in *Grubka* relied upon by the board are *dicta* and that therefore the board's holding in *Walsh* is not in accordance with law. The employees, on the other hand, argue that the relevant statements are not *dicta*; further, they argue that a reversal of *Walsh* would cause agencies to automatically charge employees with falsification when the employees deny charges of misconduct. The board, as respondent, argues that if we determine that the statements in *Grubka* are dicta we should remand for further consideration by the board.

In *Grubka*, we reversed a falsification charge that was based upon an employee's statements regarding his alleged misconduct. Grubka held a managerial position with the Internal Revenue Service, which charged him with conduct unbecoming an employee in a managerial position for allegedly embracing and kissing a female trainee at an off-duty hours Halloween party. *Grubka*, 858 F.2d at 1572-73. The agency also charged him with falsification, stating:

> *Reason II*: You made a false statement in a matter of official interest.
>
> *Specification 1*: On December 12, 1986, during an interview conducted by Mr. Curtis S. Jenkins and Ms. Eileen Collins, you denied kissing female Revenue Agent Harriet Novak on the mouth in a stairwell outside the room in which a party was being held at the Hilton Hotel, Buffalo, N.Y., on October 30, 1986. You then executed a written statement to that effect. This statement was false in that you did kiss Ms. Novak at the Hilton Hotel on that date.

Id. at 1574. The board sustained the falsification charge. We reversed the board's decision, stating:

> It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and, regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. The decision of the AJ denied Grubka his due process rights in that it denied him the right to a trial on the charge without due process of law.

Id. at 1575.

We do not agree that these statements are *dicta*. The word "*dicta*" is an abbreviation for *obiter dicta* (the singular being *obiter dictum* or, more commonly, *dictum*), which are "[w]ords of an opinion entirely unnecessary for the decision of the case." BLACK'S LAW DICTIONARY 1072 (6th ed. 1990). They include a "remark made, or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessar-

ily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument." *Id.*; *see Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (stating that broad language in an opinion unnecessary for the decision cannot be considered binding authority); *Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988) ("[I]t is well established that a general expression in an opinion, which expression is not essential to the disposition of the case, does not control a judgment in a subsequent proceeding.")

In dismissing the falsification charge in *Grubka*, this court's reasons as stated in its opinion for doing so were not *dicta* because they were essential to the decision in question. They were necessary to support the holding that "the [falsification] charge has no substance, is frivolous, and the decision of the AJ sustaining it is not supported by substantial evidence *and* is erroneous as a matter of law, and is set aside." *Grubka*, 858 F.2d at 1575 (emphasis added). One of the holdings was that the falsification charge was contrary to law; the above-quoted passage from *Grubka* was necessary to support that holding and it was therefore not *dictum*. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (stating that alternative holdings are not *dicta*); *see also Beverly v. United States Postal Serv.*, 907 F.2d 136, 137 (Fed. Cir. 1990) (stating that an AJ properly dismissed a falsification charge that was based on the petitioner's denial that she was at a football game, explaining that it was a mere denial of the misconduct charges and should not have been stated as a separate offense). Thus, *Grubka* is binding on us and on the Merit Systems Protection Board.

The facts of *Grubka* indicate that its holding was that an employee's denial of the factual basis of a charge may not be used as the basis for a falsification charge. Not only did Grubka deny the misconduct charge, conduct unbecoming an employee, he also denied kissing the trainee on the date in question, thereby denying the underlying facts related to the misconduct charge. *Grubka*, 858 F.2d at 1574. In particular, when interviewed by an agency representative, Grubka denied "kissing female Revenue Agent Harriet Novak on the mouth in a stairwell outside the room in which a party was being held at the Hilton Hotel, Buffalo, N.Y., on October 30, 1986." He also executed a written statement to that effect. Grubka thus specifically denied the facts underlying the misconduct charge. We explained in *Grubka* that, nevertheless, "the AJ held by circuitous reasoning that proof by Novak that Grubka kissed her *ipso facto* proved that his denial was false and therefore, his denial was a separate offense as charged." *Id.* We stated that this was improper because the "effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true." *Id.* at 1574-75.

OPM also argues that the relevant statements in *Grubka* should be considered *dicta* because, according to OPM, the due process issue was not fully briefed to the court in that case. OPM cites *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572-73 (1993) (Souter, J., concurring). However, a rule announced without full briefing does not necessarily lack precedential weight. *See id.* at 573 (Souter, J., concurring). Moreover, the due process issue has been briefed in this case, along with the

issue concerning whether the relevant statements in *Grubka* are *dicta*.

OPM would have us draw a distinction between denying a charge and denying the underlying facts related to the charge. While agreeing that an employee obviously may deny a charge, OPM argues that an employee's denial of underlying facts should properly provide a basis for a falsification charge. We do not agree. A denial of underlying facts is in effect a denial of the charge that they support. Allowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges.

Drawing a law-fact distinction, as OPM would have us do, would require employees not trained in the law to distinguish between a legal statement of misconduct and the facts which define the misconduct. If this were permitted, employees might be reluctant to deny charges for fear that their denials would be construed as denials of facts, which in OPM's view would subject them to an additional falsification charge, providing a more severe penalty than a misconduct charge. In the cases before us, the falsification charges resulted in penalties of removal or demotion, whereas the misconduct charges alone, once the falsification charges were reversed at the board, resulted in penalties only of suspension or letters of reprimand. If agencies were allowed to inform employees under investigation for misconduct that their denial of facts may subject them to an additional falsification charge, they may be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a

falsification charge. This dilemma might leave them without a meaningful opportunity to respond or provide a defense to the charges. It would create a "chilling effect" on their clear right to defend themselves, a "Catch-22" situation for employees that is inconsistent with the due process right provided by federal law to enable them to defend themselves.

Moreover, because memories are often faulty, responses to questions may not always be accurate. To render such statements constituting denials as actionable falsehoods might too readily transform credibility determinations into separate charges of falsification.

This does not mean, however, that an employee has a right to lie or affirmatively mislead an agency engaged in an investigation. *See Bryson v. United States*, 396 U.S. 64, 72 (1969) ("Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them."). Beyond a denial of a charge or of the factual accusations supporting a charge, an employee may not make up a false story, or tell "tall tales" in order to defend against a charge. Such falsehoods which go beyond denial and defense are actionable by an agency as falsification. For example, if an agency questions an employee regarding alleged misconduct that occurred in Washington, D.C., and the employee responds that he was in Boston at the time, when in fact he was not, that is a falsification that can constitute the basis for a charge independent of the charge of misconduct. For another example, if an agency questions an employee regarding a government-owned television set allegedly stolen from the workplace and found at his home, and the employee responds that he bought the set himself when in fact he did not, that similarly would

be a falsification separately chargeable. Moreover, when the agency is in an investigatory mode, prior to charges having been brought, the agency is entitled to truth-telling by its employees. Similarly, when investigations are conducted concerning the conduct of other employees, false statements are actionable. These examples hardly exhaust the situations in which an agency may charge an employee with making a false statement.

As further support for its position, OPM cites our decisions in *Gonzales v. Defense Logistics Agency*, 772 F.2d 887 (Fed. Cir. 1985) and *Ahles v. Department of Justice*, 768 F.2d 327 Fed. Cir. 1985). The employees in these cases were charged with both misconduct and altering documents to conceal their misconduct. OPM argues that the principle underlying these cases and *Grubka* and *Walsh* is the same, stating that "[i]f employees can be charged with misconduct and with falsifying documents to conceal their misconduct, as was done in *Gonzales* and *Ahles*, then it should be equally true that employees can be charged with misconduct and with making oral false statements to conceal their misconduct." Altering documents, however, goes beyond denial and consists of affirmative acts to mislead the agencies. These decisions thus do not support OPM's position.

OPM also argues that *Grubka* is contrary to an employee's obligation to cooperate and answer truthfully in agency investigations, citing 5 C.F.R. § 5.4. That regulation states in pertinent part:

> When required by the Office, the Merit Systems Protection Board, or the Special Counsel of the Merit Systems Protection Board, or by authorized representatives of these bodies, agencies shall make available to them, or to their authorized representatives, employees to testify in regard to matters inquired of under the civil service laws, rules, and regulations, and records pertinent to these matters. All such employees, and all applicants or eligibles for positions covered by these rules, shall give to the Office, the Merit Systems Protection Board, the Special Counsel, or to their authorized representatives, all information, testimony, documents, and material in regard to the above matters, the disclosure of which is not otherwise prohibited by law or regulation.

5 C.F.R. § 5.4 (1995). We do not agree. OPM's position, if accepted, would have the effect of requiring employees to assist in proving the charges brought against them.

The burden is on an agency to prove charges against an employee. *See* 5 U.S.C. § 7701(c) (1994); *Jackson v. Veterans Admin.*, 768 F.2d 1325, 1329 (Fed. Cir. 1985) (stating that an agency has the burden of proof and the burden of persuasion in establishing the factual basis for misconduct). An agency has means to prove charges other than through admissions or denials of an employee under investigation. While it might be easier for an agency to prove a charge by using the leverage of an added charge of falsification to compel admissions, due process requires that an employee be allowed to deny both a charge and the underlying facts without being subject to a falsification charge. Accordingly, while an employee has no right to lie or make a false statement to an agency, an employee's mere denials of charges and

their underlying facts may not be used by an agency as a basis for a falsification or similar charge.

OPM argues that the Fifth Amendment right against compulsory self-incrimination does not require a right of denial. As discussed above, however, the board did not err in determining that the holding in *Grubka* was based on procedural due process concerns. The Fifth Amendment right against compulsory self-incrimination is not dispositive of the issue here.

Finally, OPM argues that the board erred in interpreting *Grubka* to prohibit consideration of an employee's alleged false statements in a penalty determination. In *Walsh*, the board declined to consider Walsh's denial of the charges and related facts as justification for an enhanced penalty. In support of its position, OPM cites *United States v. Dunnigan*, 507 U.S. 87 (1993). The defendant in *Dunnigan* was convicted of conspiracy to distribute cocaine. Her sentence was enhanced because the trial court found that she committed perjury. She appealed to the Fourth Circuit, which affirmed the conviction but vacated her sentence, holding that the relevant sentencing guideline was unconstitutional, and reasoning that otherwise "every defendant who takes the stand and is convicted [would] be given the obstruction of justice enhancement." *United States v. Dunnigan*, 944 F.2d 178, 183 (4th Cir. 1991), *rev'd*, 507 U.S. 87 (1993). On review by the Supreme Court, Dunnigan argued that enhancing her sentence because of perjury interfered with her right to testify. The Court disagreed, stating that a defendant's right to testify does not include a right to commit perjury. *Dunnigan*, 507 U.S. at 96. Likewise, beyond their right to deny charges brought

against them and to deny facts supporting the charges, federal employees have no right to lie or make false statements to the government, and such false statements made during agency investigations and relating to alleged misconduct may properly be subject to separate falsification charges, which provide their own penalty if the requisite elements of the charge are proven.

However, *Dunnigan* does not provide an agency with the right to make dual charges of misconduct and falsification. That case only dealt with enhancement of a sentence in a criminal context, where there is a heavier burden of proof than agencies have in proving charges of falsification against employees. Moreover, the crime of perjury consists of lying under oath, a much more serious offense than violation of 5 C.F.R. § 5.4, thereby justifying a penalty beyond that levied on the basic offense. Thus, *Dunnigan* is not controlling here. In any event, if a falsification charge may not be added to a misconduct charge on the basis of mere denials, one can hardly justify enhancing a misconduct penalty because of such asserted falsification.

In sum, we hold, consistently with *Grubka*, that an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge. However, employees do not otherwise have a right to lie or make false factual statements to an agency, and such false statements made during agency investigations and relating to alleged misconduct may properly be subject to falsification or similar charges. Denials of charges and related facts may not be considered in determining a penalty.

In light of our holding here and the clarification of our holding in *Grubka*, we will now review whether the board's decisions in not sustaining the particular falsification charges before us were arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c) (1994). In *Walsh*, the alleged inconsistent statements related to Walsh's initial acknowledgement of having an intimate relationship with the patient when he was not an in-patient, and her subsequent denial of that fact. However, she consistently denied having an intimate relationship with the patient while he was an in-patient at the agency's facility. Her admission of having an intimate relationship with the patient was not a false statement, as the board found that she did have an intimate relationship with him from time to time while he was not an in-patient. Her other statements are mere denials of having an intimate relationship with the patient. Therefore, the board did not err in refusing to sustain the falsification charge against Walsh.

In *Erickson*, it was his denials of having knowledge of or participating in the "mad laugher" calls that formed the basis for the falsification charges. He was charged with conduct unbecoming a supervisor for encouraging another to make one of the "mad laugher" calls, and his statements, as they related to the alleged misconduct, were denials of having engaged in such conduct; they were thus not otherwise false. Therefore, the board did not err in reversing the falsification charge against Erickson.

In *Kye*, it was Kye's statements regarding whether or not she had control of her Diners Club card during the time in question that formed the basis of the

falsification charge against her. While she may have provided ambiguous statements regarding her control of the card, she consistently denied using the card during the time in question. She also testified that she suspected her son used the card during the time in question. This statement is consistent with her statement that she may have lost control of the card and it is also consistent with her denial of using the card. Further, she did not affirmatively state that someone else used the card; rather, she stated her belief that her son may have used it. Her statements in effect were thus denials and were not actionable false statements. Therefore, the board did not err in dismissing the falsification charge against Kye.

In *Barrett*, it was Barrett's and Roberts' denial of alleged misconduct that formed the basis for the falsification charges. In answering an investigator's questionnaire, both indicated that they knew nothing of the events in question. That was in essence a denial and was not otherwise false. Therefore, the board did not err in reversing the falsification charges against Barrett and Roberts. Falsifying time cards is another matter, but it is not before us.

CONCLUSION

The board's decisions in *Walsh*, *Erickson*, *Kye*, and *Barrett* are affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-3028

JAMES B. KING, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, RESPONDENT
AND
MERIT SYSTEMS PROTECTION BOARD, RESPONDENT

Decided: July 22, 1996

Before: RICH, LOURIE, and RADER, *Circuit Judges.*

LOURIE, *Circuit Judge.*

DECISION

The Director of the Office of Personnel Management ("OPM") petitions for review of the board's final decision in *McManus v. Department of Justice*, 66 M.S.P.R. 564 (1995), reversing a falsification charge based upon its holding in *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994). We affirm.

DISCUSSION

The Department of Justice ("the agency") employed Harry R. McManus as a Lieutenant. The agency de-

moted him to the position of Correctional Officer, charging him with (1) conduct unbecoming a supervisor based upon sexual comments that he made to one of his subordinates, Corrections Officer Judith White, and (2) making false statements during an official investigation. In an initial decision, an administrative judge ("AJ") found that when McManus was interviewed during the agency's investigation he admitted making sexual comments to White. Even though the comments were often made in an atmosphere in which workers voluntarily participated, the AJ found this to be unsuitable conduct for a supervisor and he therefore sustained the misconduct charge.

The AJ found that McManus made the following false statements during the agency's investigation:

> (1) during the interview on October 29, 1993 (interview 1), the appellant responded that he never told Officer White that he was disappointed that she did not call during the evening they were on duty together; during the interview on November 19, 1993 (interview 2), he responded that he had called Officer White and told her that he was disappointed that she had not called;
>
> (2) during interview 1, the appellant stated that he never said he would have Officer White relieved so that she could come over to FCI and tease him more; during interview 2, however, the appellant stated that maybe he had stated he would have Officer White relieved;
>
> (3) during interview 1, the appellant stated that he never asked Officer White why she had not traded posts with Officer Smith so that she

(Officer White) could be closer to him at FCI; during interview 2, he stated that, indeed, he may have asked her this;

(4) during interview 1, the appellant flatly denied discussing the subject of preferred sexual positions with Officer White; during interview 2, the appellant responded that he asked the appellant [sic], "What (positions) do you like?";

(5) during interview 1, the appellant flatly denied ever discussing Officer White accompanying him on a WITSEC trip; however, during interview 2, the appellant stated that he had asked her to accompany him; and

(6) during interview 1, the appellant denied that he told Officer White that he had a bulge (in his pants) while talking with her; during interview 2, the appellant responded, "Can you see how much you excite me?" (referring to the bulge in his pants).

When questioned about these inconsistent statements during his oral reply to the agency's notice, McManus stated that he may have "skirted the issue" in an attempt to end the investigation and that his responses during the second interview were simply elaborations of his first responses. The AJ found that McManus's explanation was not credible and that he intentionally made false statements to the agency during its investigation. Therefore, the AJ sustained the falsification charge.

However, the AJ found that the agency's penalty of demotion exceeded the tolerable bounds of reasonableness. The AJ found that McManus's comments were

mostly delivered in jest among willing participants, including White, who initiated the comments on more than one occasion. With respect to the falsification charge, the AJ considered that McManus ultimately told the truth regarding the misconduct. The AJ also considered that McManus had eleven years of service without any prior discipline. Accordingly, the AJ mitigated the penalty to a fourteen-day suspension.

The agency petitioned the full board for review. The board denied the petition as failing to meet the criteria for review under 5 C.F.R. § 1201.115; however, it reopened the appeal on its own motion under 5 C.F.R. § 1201.117. Based upon its decision in *Walsh*, in which it held that an agency may not charge an employee both with misconduct and with making false statements regarding the alleged misconduct, the board reversed the falsification charge against McManus. The board sustained the misconduct charge and found that the AJ did not err in mitigating the penalty. Accordingly, the board affirmed the initial decision as modified and sustained the mitigation of the penalty to a fourteen-day suspension. OPM now appeals.

OPM argues that the board's holding in *Walsh* is not in accordance with law. According to OPM, the board in its *Walsh* decision relied upon dicta in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1575 (Fed. Cir. 1988). We recently addressed the same issue in *King v. Erickson*, Nos. 95-3745, 95-3746 (Fed. Cir. July 16, 1996). In *Erickson*, we stated that the statements in question in *Grubka* were not *dicta*, and we held that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or

of underlying facts relating to that other charge." *Erickson*, slip op. at 22.

We review whether the board's decision in reversing the falsification charge against McManus was arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c) (1994). Each of McManus's responses alleged to be false statements was essentially a denial of the misconduct under investigation. During the agency's first interview, he stated that he never said the statements in question or he denied having said them. During the second interview, he stated substantially the opposite. Under our holding in *Erickson*, we must conclude that the first responses were within the range of denials that must be permitted in order to make meaningful the right to respond to charges; they were therefore not separately-actionable false statements. Accordingly, the board did not err in reversing the falsification charge against McManus. OPM has not appealed the issue of mitigation of the penalty, and we therefore do not address it.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. CH-0752-92-0021-I-1

JEANETTE M. WALSH, APPELLANT

v.

DEPARTMENT OF VETERANS AFFAIRS, AGENCY

[MAY 31, 1994]

OPINION AND ORDER

Before: BEN L. ERDREICH, Chairman, JESSICA L. PARKS, Vice Chairman, and ANTONIO C. AMADOR, Member.

Chairman ERDREICH issues a concurring opinion.

The agency petitions for review of the initial decision reversing the appellant's removal from her position as a GS-6 social services assistant at the agency's St. Cloud, Minnesota Medical Center. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision in part, AFFIRM the initial decision in part, and mitigate the penalty to a 90-day suspension.

BACKGROUND

The agency based its removal action on three charges: (1) Engaging in an intimate sexual relationship with an alcohol-dependent patient, Richard Brown; (2) engaging in improper financial dealings with Brown and another patient; and (3) providing false statements to the agency concerning her relationship with Brown. Agency File, Tab 4h; see also Initial Appeal File (IAF), Tab 11.

After allowing the parties to submit written evidence,[1] the administrative judge found that the first and second charges could not be upheld. He found that the agency failed to prove that the appellant had engaged in an intimate sexual relationship with Mr. Brown while he was undergoing treatment at the medical center, that certain products one patient apparently purchased were purchased from the appellant rather than from her sister, or that the other person with whom the appellant allegedly had financial dealings was a patient at the time of the alleged dealings. The administrative judge declined to uphold the third charge largely on the basis of his findings concerning the first and second charges. He therefore ordered the agency to cancel the appellant's removal.

In its petition for review,[2] the agency argues that the administrative judge erred in finding that it failed to establish that the appellant was involved in an

[1] The appellant did not request a hearing, and thus the administrative judge rendered his decision based on the written record.

[2] The agency has provided evidence of compliance with the administrative judge's interim relief order sufficient to meet the requirements of 5 C.F.R. § 1201.115(b).

intimate sexual relationship with Mr. Brown while he was an in-patient and an out-patient at the medical center. It points to several alleged inconsistencies in the appellant's statements regarding her relationship with Mr. Brown, and asserts that the administrative judge erred in finding the appellant's statements concerning the relationship to be more specific and consistent than Mr. Brown's statements that he and the appellant had an intimate relationship while he was a patient at the St. Cloud facility. The agency argues that the administrative judge further erred in finding that it had failed to establish that the appellant provided false or misleading information when she denied having an intimate relationship with Mr. Brown while he was a patient and in finding that it had failed to establish that she concealed a fact in connection with the agency's inquiry into the matter by persuading Mr. Brown to conceal his relationship with her.[3]

ANALYSIS

Contrary to the administrative judge's finding, the agency did prove that the appellant had an intimate sexual relationship with Mr. Brown while he was an in-patient at the medical center.

The agency's assertion that the appellant has provided inconsistent explanations of the length of her relationship with Mr. Brown is correct. In an affidavit dated December 30, 1991, the appellant stated that she had sexual relations with Mr. Brown three or four times in the summer of 1989. Appeal File, Tab

[3] The agency has not challenged the administrative judge's findings regarding any of the other specifications on which the removal was based.

9. In her statement to agency investigators, however, she asserted that she had an intimate relationship with Mr. Brown for approximately a year and half, beginning in November of 1988. Agency File, Tab 4k at 5. The appellant also acknowledged in that statement that, when she met with her supervisor in December of 1988—when Mr. Brown was no longer an in-patient—she was having a relationship with him. *Id.* at 9-10. In her December 30, 1991 affidavit, however, she stated that, during the December 1988 meeting with her supervisor, she correctly denied having an intimate relationship with Mr. Brown at the time of the meeting. Appeal File, Tab 9. Thus, the appellant's statements regarding when her relationship with Mr. Brown started and how long it lasted are inconsistent. Despite these inconsistencies, however, the appellant has consistently stated that she did not have an intimate relationship with Mr. Brown while he was an in-patient at the medical center from April of 1988 until November 1, 1988.

The agency argues, in effect, that the inconsistencies in the appellant's statement discredit that statement, and that, once the statement of a witness has been discredited on one issue or charge, an administrative judge may not accept the statement of the same witness on other charges unless he provides some reasoned explanation of that acceptance. *See* Petition for Review at 4. The latter part of this argument is supported by the Board decision on which the agency relies, *Sternberg v. Department of Defense*, 41 M.S.P.R. 46, 54 (1989). That case also states, however, that an administrative judge is not required to discredit all of the statement of a witness when some of the statement is discredited, but if some of the statement is to be found credible, the administrative

judge must provide a reasoned explanation. *Id.* In this case, the administrative judge did not address the inconsistencies in the appellant's various explanations, and he did not discuss why some of the appellant's statements are credible while others are not. This failure warrants Board review since, as discussed below, the appellant's statements are in contrast with Mr. Brown's statements. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980) (in reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge, giving his findings only as much weight as may be warranted by the record and by the strength of his reasoning), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The agency's investigation into the appellant's relationship with Mr. Brown was initiated as a result of a letter to the agency from Mr. Brown's wife, Donna.[4] In that letter, Mrs. Brown complained that the staff at the medical center had determined that her husband should be admitted to the agency's Kennic Falls, Wisconsin, facility, and not the St. Cloud facility, because of his previous relationship with the appellant. Mrs. Brown had no direct evidence regarding her husband's relationship with the appellant, however; her subsequent statement to agency investigators was based entirely on Mr. Brown's statements to her about the relationship. *See* Agency File, Tab 4s. Although hearsay evidence is admissible in Board proceedings, the probative value of Mrs. Brown's statement is slight because of

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[4] Richard and Donna Brown were not married at the time of the appellant's relationship with Mr. Brown; they did not meet until April of 1990. Agency File, Tab 4k at 11.

her lack of direct knowledge and the fact that Mr. Brown—the source of her knowledge—also provided a statement. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981) (assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case). Further, Mrs. Brown's statement that her husband was sent to the Kennic Falls, Wisconsin, facility because of his prior relationship with the appellant is not supported by the statements of Mr. Brown's treating therapists, counselors, and social workers. They stated that Mr. Brown was admitted to the Kennic Falls facility based on their assessment of his clinical needs, an assessment that was unrelated to the appellant's presence at the St. Cloud facility. Agency File, Tabs 41 at 1-2 (statement of James Broda), 4n at 3 (statement of John Pucel), 4m at 1 (statement of Siri Krawchuk), 4o at 1-2 (statement of Irene Oberman), and 4t at 1 (statement of Ronald Williams).

To support its allegation that the appellant was involved in an intimate sexual relationship, the agency relied extensively on Mr. Brown's statement to the investigators. He maintained in his statement that he became involved with the appellant in September of 1988, that the relationship lasted six or seven months, and that they had sexual relations almost every weekend from mid-September 1988 until his discharge from the medical center in November of 1988. *See* Agency File, Tab 4j at 1 and 6. He also maintained that he lied to the appellant's supervisor in December of 1988, in order to protect the appellant, when he told the supervisor that he knew the appellant in North Dakota in the early 1980s and refused to disclose to the supervisor the existence of the relationship. *Id.* at 2 and 7-8.

Mr. Brown's statement is bolstered by the joint statement of his Alcoholics Anonymous sponsors, Dale and Linda Willet. The Willets corroborate Mr. Brown's statement that the appellant and Mr. Brown were friends and that Brown at least occasionally would spend weekends at the appellant's home in the autumn of 1988, but they both admitted that they did not know whether Mr. Brown and the appellant engaged in sexual relations while he was an in-patient. *See* Agency File, Tab 4r at 3-4.

Contrary to the administrative judge's finding that Mr. Brown's statements were "general and inconsistent," Initial Decision at 9, we find Mr. Brown's statement about his relationship with the appellant to be consistent and detailed. Mr. Brown provided significant details about his relationship with the appellant and specifically described the interior of her home. *See* Agency File, Tab 4j. While his statement is inconsistent with an earlier statement to the appellant's supervisor, Mr. Brown explained that he refused to disclose the relationship in an effort to protect the appellant. *Id.* at 7-8. Although the Willets' limited knowledge is of little probative value, it does lend some support to Mr. Brown's assertion that he was involved in a relationship with the appellant.[5]

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[5] The administrative judge discredited the Willets' statement because they asserted that they reported the alleged intimate relationship to agency employees in 1989 or 1990, but the record shows that the report was made in December of 1988. Initial Decision at 8-9. The administrative judge also discredited the Willets' statement because of the implausibility of the statement that Mr. Brown told Mr. Willet that the appellant purchased alcohol for him. *Id.* According to the administrative judge, neither Mr. Willet nor the agency presented any

Thus, in contrast to the appellant's self-serving denials of an intimate relationship with Mr. Brown while he was an in-patient at the medical center, Mr. Brown's statements have been detailed regarding the existence of such a relationship. We can conceive of no reason for Mr. Brown to fabricate the existence of such a relationship and the appellant has provided none. If Mr. Brown desired to please his current wife, who was very upset about his being sent to the Kennic Valley facility for treatment,[6] it is likely that he would have attempted to minimize the length of his relationship with the appellant. Thus, we sustain the charge of having an intimate relationship with an in-patient of the medical center.

Also contrary to the administrative judge's finding, the agency did prove that the appellant engaged in sexual relations with Mr. Brown while he was an out-patient at the medical center.

The agency also argues that the appellant admitted having sexual relations with Mr. Brown while he was an out-patient from November 15, 1988, to March 2,

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evidence that the alcohol purchase was ever reported, even though such a purchase "would have had a far more direct bearing on Mr. Brown's sobriety than his asserted intimate relationship with the appellant." *Id.* at 9. The agency asserts that the administrative judge erred in discrediting the Willets' statement because of the discrepancies in dates, and we agree. The fact that the Willets erred in recalling the date of a situation that existed several years earlier is not grounds to discredit their entire statement. Additionally, the fact that the Willets did not report Mr. Brown's statement that the appellant purchased alcohol for him is not grounds to discredit their statement. Nevertheless, because of their limited knowledge, their statement is of little probative value.

[6] *See* Agency File, Tabs 4m at 4-5 (statement of Siri Krawchuk).

1990. In a December 20, 1991 affidavit, Ronald Williams stated that Mr. Brown missed several out-patient appointments at the medical center between November 15, 1988, and March 2, 1990. *See* Appeal File, Tab 6, Affidavit of Ronald Williams at 1 and accompanying list. Thus, we find that Mr. Brown was an out-patient at the agency medical center after his early November of 1988 discharge from its domiciliary unit. Since the appellant admitted, as mentioned above, that she had sexual relations with Mr. Brown on and off between November of 1988 until April of 1990, see Agency File, Tab 4k at 2, we also sustain the charge that the appellant had an intimate relationship with Mr. Brown while he was an out-patient.

The agency failed to prove the specification of the falsification charge that the appellant persuaded Mr. Brown to conceal the existence of their relationship.

The administrative judge properly found that the agency failed to prove that the appellant persuaded Mr. Brown in December 1989 to conceal from the appellant's supervisor the existence of their relationship. To support this specification, the agency relied on Mr. Brown's statement to the agency investigators that the appellant told him that, if her supervisor found out about the relationship, she would be in a lot of trouble and would probably lose her job. *See* Agency File, Tab 4j at 2. Mr. Brown also stated that he had refused to say that he was involved in a relationship with the appellant because he wanted to protect her and because he thought the agency would "take my sex away." Agency File, Tab 4j at 8. Thus, according to Mr. Brown's statement, while the appellant told him of possible consequences if her supervisor found out about the relationship, the appellant never asked him to conceal their relation-

ship; instead, his statement indicates that he decided on his own to lie. Thus, the administrative judge properly did not sustain this aspect of the falsification charge.

The agency improperly charged the appellant with providing false statements concerning her relationship with Brown.

As discussed above, the agency charged the appellant with providing false statements concerning her relationship with Mr. Brown. Specifically, on review, the agency points to the inconsistent statements that the appellant has provided to it and asserts that these statements demonstrate that the appellant falsified.

In *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574 (Fed. Cir. 1988), the court addressed the situation where an agency charges an employee with misconduct and separately charges him or her with making a false statement in response to an agency inquiry about the misconduct. The court in *Grubka* found circuitous and without merit the administrative judge's reasoning in that appeal that, by proving the underlying misconduct, the agency ipso facto proved that Grubka's denial of the misconduct was false and therefore proved the separate offense of making a false statement. *Id.* The court in *Grubka* stated as follows:

> It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. The decision of the [administrative judge] denied Grubka his due process rights in that it denied him the right to a trial on the charge without due process of law.

Id. at 1575.[7]

We recognize that the Board has previously held that an agency may separately charge an employee with misconduct and making false statements regarding the alleged misconduct, when the falsification concerns a matter of official interest to the agency. *See Greer v. U.S. Postal Service*, 43 M.S.P.R. 180, 184-85 (1990); *see also, e.g., Kane v. Department of Veterans Affairs*, 46 M.S.P.R. 203, 209 (1990); *Sterling v. Department of Defense*, 46 M.S.P.R. 177, 185-86 (1990); *Hornbuckle v. Department of the Army*, 45 M.S.P.R. 50, 54 n. 2 (1990); *Hill v. Department of the Army*, 44 M.S.P.R. 607, 611-12 (1990). Upon further consideration, however, we find that such decisions are based on a faulty analysis of the Federal Circuit's decision in *Grubka*.

The agency specifically charged *Grubka* with making a false statement in a matter of official interest. *Grubka*, 858 F.2d at 1574. The Federal Circuit stated, however, that such a charge "has no substance, is frivolous, and . . . it is not supported by substantial evidence and is erroneous as a matter of law. . . ." *Id.* By using the conjunctive "and" the court made two separate findings: that the charge was

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[7] The Federal Circuit reaffirmed its holding in *Grubka* in *Beverly v. U.S. Postal Service*, 907 F.2d 136, 137 (Fed. Cir. 1990), in finding that the administrative judge correctly held that a charge of making a false statement in denial of another charge should not have been stated as a separate offense.

erroneous as a matter of law, and that the charge was not supported by substantial evidence. *Id.* Thus, the court opined that a separate charge of making a false statement regarding other alleged misconduct was erroneous as a matter of law. *Id.*

The court also found that the agency's charge must fail because the appellant's alleged false statement "was not a denial of a matter of official interest to the IRS, because it had nothing to do with the work of the agency." *Id.* at 1575. This holding pertained to the agency's failure to prove every element of its charge, namely, that Grubka made a false statement and that the false statement dealt with a matter of official interest to the agency. *Id.* Contrary to our previous holdings, we find that this statement was not intended to carve out an exception to the court's holding that the denial of another charge can never itself be a separate offense; rather, it pertained to the evidence presented in support of that charge.

In *Greer* and its progeny, the Board also mischaracterized the Federal Circuit's due process concerns by stating that the court was concerned with the appellant's Fifth Amendment right to remain silent. On further consideration, we find that the court was actually more concerned about an appellant's due process right to have an opportunity to be heard on a charge, and not to have a falsification type charge automatically sustained by virtue of the sustaining of an underlying charge. *See Grubka*, 858 F.2d at 1575.

In addition, the Board's decision in *Greer* was erroneous for stating that, as an alternative to falsifying during an agency investigation, an employee may refuse to answer questions. *Greer*, 43 M.S.P.R. at 186. That statement ignored the fact that, under Board and Federal Circuit precedent, an employee

may be removed solely for remaining silent in response to an inquiry if the employee is adequately informed that he or she is subject to discharge for not answering questions and that any replies and their fruits cannot be employed in a criminal case. *See Weston v. Department of Housing & Urban Development*, 724 F.2d 943, 949 (Fed. Cir. 1983); *Haine v. Department of the Navy*, 41 M.S.P.R. 462, 469 (1989).

Thus, to the extent that *Greer*, and cases that rely on its holding, hold that an agency may separately charge an employee with misconduct and making false statements or a similar offense regarding the alleged misconduct, we overrule them. We find that the charge of making false statements was improper and that the administrative judge erred in considering it.

A 90-day suspension is the maximum reasonable penalty for the sustained misconduct.

When the Board does not sustain all of the agency's charges and specifications, we must carefully consider whether the sustained misconduct merits the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). In this case, we have found that, while employed as a social services assistant, the appellant engaged in sexual relations with an alcohol-dependent patient at the agency medical center. The sustained charge is serious since, as stated by the chief of the domiciliary unit, patients are very vulnerable and dependent and can be easily manipulated by the staff. Appeal File, Tab 6 (statement of Ronald Williams) at 2. As further stated by the chief of the domiciliary unit, personal relationships can tempt dependency and hamper a patient's efforts at sobriety. *Id.* Thus, we find that the appellant's relationship with Mr. Brown went to the core of her duties as a social services assistant in

the domiciliary unit. Moreover, the misconduct was intentional and continued for some 18 months.

Although the Board has previously held that an appellant's false statements may be considered in determining the maximum reasonable penalty, we are not considering the appellant's apparently false statements here. If we are to give meaning to the Federal Circuit's statement that a person charged with an offense may deny the charge and force the charging party to prove the charge, we must hold that the denial of misconduct cannot result in harm to the accused. Otherwise, we are still saying that the accused may only deny a charge at his or her own peril. Accordingly, to the extent that previous Board decisions have held that an appellant's false statements in response to an agency inquiry may be considered in determining the penalty, we overrule them.

Despite the seriousness of the appellant's misconduct, she has over 17 years of service with the agency, at least the last year of which was rated at the highly successful level. In addition, the record contains no indication of any prior disciplinary actions against her. Thus, we find that a 90-day suspension is sufficient to impress upon the appellant the seriousness of her misconduct, and that it constitutes the maximum reasonable penalty for the sustained misconduct.

ORDER

Accordingly, we ORDER the agency to cancel the appellant's removal and to replace it with a 90-day suspension effective September 26, 1991. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the

Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ ROBERT E. TAYLOR
ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF CHAIRMAN BEN L. ERDREICH

Jeanette M. Walsh v. Department of Veterans Affairs
CH-0752-92-0021-I-1

I concur in the majority opinion in this appeal because it is consistent with the binding precedent of the U.S. Court of Appeals for the Federal Circuit. Nevertheless, I write separately to express my concerns about how the Federal Circuit's holdings that control the Board's decision in this case[8] comport with federal statutory and regulatory requirements.

In *Grubka* and *Beverly* the Federal Circuit established and affirmed the principle that a federal employee may not be disciplined for both an act of misconduct and the false denial of that act of misconduct. In other words, an employee may give an untrue denial statement in response to an agency investigation into his alleged misconduct without the possibility of discipline for that statement (so long as the underlying misconduct being investigated ultimately is used to support a formal disciplinary charge against the employee). In application, this principle seems to conflict with several mandates that require a federal employee to be truthful in dealings with his federal employer.

For example, 18 U.S.C. § 1001 requires individuals to be truthful in any statements given in a matter within the jurisdiction of a federal agency, or suffer the penalty of a fine of up to $10,000 and imprisonment

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[8] *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988) and *Beverly v. United States Postal Service*, 907 F.2d 136 (Fed. Cir. 1990).

of up to five years. Title 5 of the Code of Federal Regulations, section 5.4 (Civil Service Rule V) requires employees to give testimony under oath when required to by the Office of Personnel Management, the Merit Systems Protection Board, or the Office of Special Counsel. Agency inspectors general investigating alleged fraud, federal security specialists investigating alleged security breaches, and EEO investigators investigating alleged discrimination all conduct inquiries on behalf of agencies and all routinely rely on the truthfulness of the statements made by federal employees.

Under 18 U.S.C. § 1001 even individuals who are being questioned about possible criminal wrongdoing do not have the right to provide false information, yet *Grubka* and *Beverly* hold that an employee being questioned about possible non-criminal misconduct is allowed to provide false information with impunity. Although the former individual may exercise his Fifth Amendment right to remain silent, the latter does not enjoy that right and may not decline to answer questions from his employer.[9]

Thus *Grubka* and *Beverly* have the anomalous result that an employee may be required to respond to an agency inquiry, but may not be required to respond truthfully. They also give federal employees a privilege not accorded to ordinary citizens who "may decline to answer the question, or answer it honestly,

[9] *See Weston v. Department of Housing & Urban Development*, 724 F.2d 943, 948-49 (Fed. Cir. 1983) (a federal employee may be removed solely for remaining silent in response to an agency inquiry if the employee is adequately informed that he or she is subject to discharge for not answering questions and that any replies and their fruits cannot be used in a criminal case).

but [who] cannot with impunity knowingly and willfully answer with a falsehood." *Bryson v. United States*, 396 U.S. 64, 72 (1969).

Title 18 U.S.C. § 1001 criminalizes the making of a false, fictitious, or fraudulent statement to a federal department or agency by an employee regarding his or her employment. Its application under *Grubka* and *Beverly* apparently means that an employee could be fined and imprisoned for making false, fictitious, or fraudulent statements, but the employing agency could not consider those statements in connection with an adverse action based in part on any misconduct at issue in the false, fictitious, or fraudulent statements.

I am aware that a majority of federal circuit courts of appeals has adopted the principle that the subject of a criminal investigation may falsely deny a charge of misconduct without violating 18 U.S.C. § 1001.[10] However, I do not find that doctrine analogous to this situation because (1) the administrative proceedings in this case do not involve the Fifth Amendment right to remain silent found in criminal proceedings, (2) the statements made in *Grubka* and *Beverly* are more than the simple denials of misconduct, and (3) the false statements made by Ms. Walsh were made for the purpose of retaining her federal position. This

[10] The "exculpatory no" doctrine is discussed in *United States v. Taylor*, 907 F.2d 801, 803-06 (8th Cir. 1990); *United States v. Cogdell*, 844 F.2d 179, 182-84 (4th Cir. 1988); *United States v. Medina De Perez*, 799 F.2d 540, 542-47 (9th Cir. 1986); *United States v. Tabor*, 788 F.2d 714, 716-19 (11th Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 876-81 (10th Cir. 1980); *United States v. Chevoor*, 526 F.2d 178, 181-84 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

last condition has been specifically referenced as a situation not protected by the doctrine.[11]

In *Grubka* the Court held that Mr. Grubka could not be disciplined for either the false denial of the charged misconduct or for giving a written statement supporting that denial. In *Beverly* the Court held that Ms. Beverly could not be disciplined for either the false denial of the charged misconduct or for providing false notarized statements from other individuals supporting her untruthful denial. This is clear direction to the Board that we also should reverse disciplinary charges that are based on the denial of misconduct or on statements made in support of that denial.

Regardless of federal statutory and regulatory mandates requiring employee honesty in dealings in matters within the jurisdiction of a federal agency, under *Grubka* and *Beverly* the Board is compelled not to sustain any charges related to enforcing this standard of truthfulness if the employee is denying misconduct that is the basis for a separate formal disciplinary charge against that employee.

In this case Ms. Walsh was charged with making seven false statements.[12] One of those statements was found by the Board not to be false. Of the remaining six statements, five are specific denials of acts that would constitute engaging in an intimate relationship with a patient, and the sixth is a falsehood

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[11] *Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962), overruled by *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (en banc); *Marzani v. United States*, 168 F.2d 133, 141-42 (D.C. Cir.), *aff'd on appeal by an equally divided Supreme Court*, 335 U.S. 895 (1948).

[12] Agency File, tab 4h.

about a fact related to her relationship with that patient. Since a separate charge that is the basis for this removal is engaging in an intimate relationship with a patient, the entire charge of making false statements in an agency investigation must be set aside as inconsistent with the rule in *Grubka* and *Beverly*. This is true even though there are other statutory or regulatory admonitions requiring truthfulness of federal employees.

I have concerns about how this decision following *Grubka* and *Beverly* affects the standards of employee conduct basic to the ethical underpinnings of our federal civil service. Accordingly, I concur with the majority opinion but with the reservations discussed above.

/s/ BEN L. ERDREICH
BEN L. ERDREICH
Chairman

[Decision Sheet Omitted]

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. DA-0752-93-0295-I-1

LESTER E. ERICKSON, APPELLANT

v.

DEPARTMENT OF THE TREASURY, AGENCY
MERIT SYSTEMS PROTECTION BOARD

[Filed: June 1, 1994]

Before: ERDREICH, Chairman, PARKS, Vice Chairman, and AMADOR, Member.

OPINION AND ORDER

The appellant petitions for review of the July 21, 1993 initial decision that upheld his removal. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision IN PART, REVERSE the initial decision IN PART, and MITIGATE the removal to a 15-day suspension.

BACKGROUND

The agency removed the appellant from his Police Sergeant position for: (1) "Making False Statements in Matters of Official Interest"; and (2) "Conduct Unbecoming a Supervisor." Initial Appeal File (IAF), Tab 8, Subtabs 4a, 4b, 41. The appellant filed a timely petition for appeal in which he alleged that, in removing him, the agency discriminated against him on the basis of a handicapping condition and violated his constitutional rights. IAF, Tab 2. The administrative judge, deciding the appeal on the basis of the parties' written submissions, sustained both charges, rejected the appellant's claims of handicap discrimination and violation of his constitutional rights, and affirmed the removal. IAF, Tab 26.

The appellant reiterates his handicap discrimination claim and his constitutional claims in his timely petition for review. Petition for Review (PRF), Tab 1. The agency opposes the petition for review. PRF, Tab 3.

ANALYSIS

The petition for review establishes no error; the initial decision is affirmed in part.

The appellant does not identify in his petition for review any legal error on the administrative judge's part with respect to the charges or his handicap discrimination claim, nor does he identify any relevant evidence that the administrative judge overlooked or misinterpreted. We therefore deny the petition for review. 5 C.F.R. § 1201.115(c). Having reopened this appeal, and discerning no error in the initial decision's sustaining charge (2) and rejecting the appel-

lant's handicap discrimination claim, we affirm those findings.

Charge (1) cannot be sustained.

The agency specified in support of charge (1) that the appellant "had knowledge of, and participated in," a series of anonymous harassing telephone calls received by agency employees. The caller was referred to as the "Mad Laugher" because he or she would laugh wildly into the telephone and then hang up. The agency further specified that the appellant gave a sworn statement to an agency investigator in which he denied knowing who had made the calls. It therefore charged him with "Making False Statements in Matters of Official Interest" in violation of the agency's Minimum Standards of Conduct. IAF, Tab 8, Subtab 41; *see* IAF, Tab 8, Subtab 4cc at 2.

Charge (1) appears to be based on the appellant's responses to question numbers 2, 6, 9, and 12 on the list of questions that an agency investigator posed to him on October 30, 1992. Question number 2 states, "Approximate the number of occasions you made 'Mad Laugher' calls and to whom by name?" The appellant responded, "None." Question number 6 states, "Approximate time you quit participating in "Mad Laugher" calls." The appellant responded, "I never participated." Question number 9 states, "Specifically, how many times did you ask your subordinates to cease the 'Mad Laugher' calls?" The appellant responded, "None, [b]ecause I do not know who is doing it." Question number 12 states in pertinent part, "Are you willing to specifically state all those that are participants in the 'Mad Laugher' telephone calls." The appellant responded, "No—I do not know the true identification of the 'Mad Laugher.' In my

opinion it is 95% of the police unit [and] also possibly personnel in Production." *See* IAF, Tab 8, Subtab 4x at 5, 7, 9. Charge (2), "Conduct Unbecoming a Supervisor," was based on the appellant's having encouraged an employee of an agency contractor to make a "Mad Laugher" call to another agency police officer during duty hours. IAF, Tab 8, Subtab 41.

An agency may not charge an employee with falsely denying misconduct when it is separately charging the employee with the underlying misconduct. *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-75 (Fed. Cir. 1988); *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586, 595 (1994). Thus, charge (1) cannot be sustained, for its essence is the appellant's failure to admit that he was involved in the misconduct under investigation.

We note that the agency, in its submission to the administrative judge, alleged that several police officers witnessed the appellant making "Mad Laugher" calls to agency employees during duty hours. IAF, Tab 25 at 6. The agency did not charge the appellant with making such calls, however. Charge (1) is based entirely on the veracity of statements that the appellant made to an agency official who was investigating the calls. Although charge (1) does make reference to the appellant's "participat[ion] in" the "Mad Laugher" calls, it is captioned "Making False Statements in Matters of Official Interest," it cites a provision of the agency's Minimum Standards of Conduct that relates solely to making false statements, and the specification in support of the charge relates only to the appellant's answers to the agency investigator's questions. IAF, Tab 8, Subtabs 41, 4cc at 2. Charge (2) is based entirely on the appellant's having encouraged an employee of an agency contrac-

tor to make a call. IAF, Tab 8, Subtab 41. Neither charge, therefore, was sufficient to put the appellant on notice that he was being charged with making "Mad Laugher" calls.

The Board will not sustain an adverse action on the basis of charges that could have been brought, but were not. *Nazelrod v. Department of Justice*, 54 M.S.P.R. 461, 466 (1992). Accordingly, we disregard the agency's allegation that the appellant made "Mad Laugher" calls.

We therefore reverse the initial decision insofar as it sustained charge (1).

The penalty of removal is mitigated to a 15-day suspension.

Where, as here, not all of the charges upon which an agency based an adverse action are sustained, the Board must carefully consider whether the sustained charges merit the penalty imposed. *See Montalvo v. U.S. Postal Service*, 55 M.S.P.R. 128, 132-33 (1992).

Again, charge (2) is based on the appellant's having encouraged an employee of an agency contractor to make a "Mad Laugher" call to another agency police officer during duty hours. IAF, Tab 8, Subtab 41. This misconduct reflected poor judgment on the appellant's part. On the other hand, it was not "disruptive," as averred by the deciding official, IAF, Tab 23 at 2, for as stated in the notice of proposed removal, the contractor's employee did not make the call, IAF, Tab 8, Subtab 41.

Further, although the appellant, as a supervisor, is held to a higher standard of conduct than a non-supervisory employee, *Jackson v. U.S. Postal Service*, 48 M.S.P.R. 472, 476 (1991), it does not appear from the affidavit of the contractor's employee that the appellant encouraged her to make the telephone call openly and in front of his subordinates, IAF, Tab 8, Subtab 4y. Thus, his misconduct was not such that it destroyed his ability to effectively supervise.

Additionally, although the deciding official considered the appellant's having denied his involvement in the "Mad Laugher" calls to have been "blatant dishonesty," IAF, Tab 23 at 2, we do not consider it as an aggravating factor, *see Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586, 595-596 (1994) (an employee's false denial of misconduct is not an aggravating factor in assessing the penalty for the misconduct).

The appellant performed satisfactory service in his Police Sergeant position for approximately two years and four months. IAF, Tab 8, Subtabs 4a, 4bb. There is no evidence to indicate that he has a record of discipline for misconduct, and in any event, the agency did not cite elements of his record in the notice of proposed removal. IAF, Tab 8, Subtab 41; *see Underwood v. Department of Defense*, 53 M.S.P.R. 355, 360 (an employee's past disciplinary record cannot be considered in determining the appropriate penalty for misconduct if it was not cited in the notice of adverse action), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table). For the single instance of encouraging an employee of an agency contractor to make a "Mad Laugher" call that the employee did not make, we conclude that the maximum reasonable penalty, under the circumstances, is a 15-day suspension.

ORDER

We ORDER the agency to cancel the appellant's removal and to replace it with a 15-day suspension, retroactive to March 20, 1993. *See Kerr v. National*

Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201. 113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representa-

tion by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ ROBERT E. TAYLOR
ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

[Decision Sheet Omitted]

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. PH-0752-93-0524-I-1

SHARON KYE, APPELLANT

v.

DEFENSE LOGISTICS AGENCY, AGENCY
MERIT SYSTEMS PROTECTION BOARD

[Filed: Oct. 4, 1994]

Before: EDREICH, Chairman, PARKS, Vice Chairman, and AMADOR, Member.

OPINION AND ORDER

The appellant petitions for review of the November 12, 1993 initial decision that sustained her removal. For the reasons discussed below, we GRANT the petition, REVERSE the initial decision in part, AFFIRM the initial decision in part, and MITIGATE the penalty to a 45-day suspension.

BACKGROUND

The agency removed the appellant from the GS-12 position of Supervisory General Supply Specialist based on the following six charges: failure to safeguard her government Diners Club Card and personal identification number (PIN) (first offense); failure to

follow specific instructions for reporting loss, theft, or compromise of her government Diners Club Card and/or PIN; failure to fully participate in an official investigation (first offense); misuse of her government Diners Club card (first offense); providing false information in an official investigation (first offense); and failure to properly notify the agency of an unscheduled absence (first offense).

The administrative judge found that the agency did not prove two of the charges, i.e., failure to fully participate in an official investigation and failure to properly notify the agency of an unscheduled absence. Also, he found that the appellant did not prove her affirmative defenses of handicap discrimination based on alcoholism and reprisal for filing an equal employment opportunity complaint. The administrative judge sustained the agency's removal action based on the appellant's sustained misconduct which included her response to the agency's inquiry into that matter. Initial Appeal File (IAF), Tab 18 (Initial Decision at 21).

In her petition for review, the appellant alleges that the administrative judge erred in finding that she had not demonstrated that she was an alcoholic, in failing to address her allegation that the agency discriminated against her on the basis of the handicapping condition of mood disorder and depression, and in not considering the cumulative effect of these claimed medical conditions in his adjudication of her handicap discrimination claim.

ANALYSIS

The administrative judge erred by limiting his analysis of the appellant's handicap discrimination claim to the condition of alcoholism, but this error

was not prejudicial; the Board finds no merit to the claim.

The appellant raised a claim of handicap discrimination on the additional basis of depression below by submission of a letter from her physician diagnosing her depression, and by counsel at the hearing. IAF, Tab 17; Hearing Transcript at 6. Although the administrative judge alluded to the evidence concerning the appellant's condition of depression, ID at 16-18, he did not analyze that matter in connection with the appellant's handicap discrimination claim. This adjudicatory error did not prejudice the appellant's substantive rights, however, because the appellant has failed to demonstrate that her claimed medical conditions, either alone or in tandem, caused her sustained misconduct. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

Specifically, we find that the appellant has failed to make out a prima facie case of handicap discrimination. The necessary elements of a prima facie case of handicap discrimination will vary according to the particular facts and circumstances at issue. *See Dazey v. Department of the Air Force*, 54 M.S.P.R. 658, 661 (1992). Generally, the elements of a prima facie case of handicap discrimination based on a mental illness such as depression include: a showing that the person is a qualified handicapped person and that the action appealed was based on his handicap; and, to the extent possible, an articulation of a reasonable accommodation under which the employee believes he could perform the essential duties of his position. *Id.* To make out a prima facie case of handicap discrimination based on the condition of alcoholism, an appellant must prove that he is a qualified handicapped person and that his handicap caused his

misconduct or that the misconduct was entirely a manifestation of his handicap. *See Davis v. Department of the Army*, 57 M.S.P.R. 203, 208-09 (1993).

Here, we note that the physician who diagnosed the appellant's mood disorder and depression, Patrick Thrasher, M.D., first saw her July 23, 1993, almost three months after the occurrence of the charged misconduct. IAF, Tab 18 (ID at 16). Therefore, this evidence provides scant support for a finding that the appellant's misconduct was caused by that condition.

Further, the administrative judge's finding that the appellant had not shown a causal relationship between her claimed alcoholism and the sustained misconduct, IAF, Tab 18 (ID at 19), similarly leads to a finding of a lack of causation between the sustained misconduct and the appellant's depression or a combination of those two claimed medical conditions. That is, the administrative judge, assuming *arguendo* that the appellant had established that she suffered from the handicapping condition of alcoholism, nevertheless correctly found that:

> The agency did not specifically claim that the appellant used her card to withdraw cash; but rather, that she failed to safeguard her card and PIN, failed to report its loss . . ., and, on one occasion, used the card for the rental of a motel room. The appellant has not claimed that she does not recall not missing the card, [or] not knowing of her responsibilities with the card. . . .

Id. Therefore, inasmuch as the appellant did not establish causation, we find that she failed to make out a prima facie case of handicap discrimination with regard to the medical conditions of alcoholism or

depression, or a combination of the two. *See Dazey*, 54 M.S.P.R. at 661.

The agency improperly charged the appellant with providing false information in an official investigation.

In *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), the Board, interpreting *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir.1988), recently held that an agency may not, as a matter of law, separately charge an employee with making a false statement in defending a charge of alleged misconduct. Here, the agency charged the appellant with misconduct in connection with her government Diners Club Card. Under Walsh, the agency's additional charge of providing false information in an official investigation regarding the alleged misconduct cannot be sustained.

A 45-day suspension is the maximum reasonable penalty for the sustained misconduct.

When not all of the charges are sustained, the Board will consider carefully whether the sustained charges warrant the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 308 (1981). In this case, three of the six charges against the appellant, including the charges that the agency considered the most serious, IAF, Tab 3, Subtab 1, have not been sustained. The sustained charges, i.e., (1) failing to safeguard a government Diners Club Card and PIN; (2) failure to follow specific instructions for reporting loss, theft, or compromise of a government Diners Club Card and/or PIN; and (3) one instance of misuse of a government Diners Club Card, are serious. They must, however,

be balanced against the appellant's unblemished record, which the agency considered excellent, IAF, Tab 18 (ID at 21), and the fact that, of her own volition, the appellant has taken full responsibility for repaying the improper charges to her government credit card. The Board finds therefore that a 45-day suspension is the maximum reasonable penalty for the sustained charges. *See Nelson v. Veterans Administration*, 22 M.S.P.R. 65 (1984); *Johnson v. Department of the Treasury*, 15 M.S.P.R. 731 (1983), *aff'd*, 770 F.2d 181 (Fed. Cir. 1985) (Table).

ORDER

We ORDER the agency to cancel the appellant's removal and to substitute a 45-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed.Cir.1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the

agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

AMADOR, Member, issues a dissenting opinion.

For the Board:

ROBERT E. TAYLOR,

WASHINGTON, DC.

DISSENTING OPINION OF MEMBER AMADOR.

I dissent.

In determining whether an agency selected penalty is to be upheld, the Board has long followed the principles set forth in *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280 (1981). The majority opinion exhibits a flawed understanding of this decision and distorts the factual record to support its conclusion that mitigation is warranted.

The first and most important of the twelve *Douglas* factors is:

> The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated. *Id.*, 5 M.S.P.R. at 305

There is no question that, under this factor, the appellant's offenses were extremely serious. The appellant repeatedly and intentionally misused her government credit card for her (or her son's) personal gain. A total of over $2000 in cash withdrawals were made on 29 different occasions using the appellant's government credit card.

The second *Douglas* factor is the employee's job level and type of employment, including whether the

employee was a supervisor. The appellant occupied a supervisory position at a fairly high position within the agency (Branch Director, GS-12). The Board has traditionally held supervisory employees to higher standards of conduct. *See, e.g., Walcott v. U.S. Postal Service*, 52 M.S.P.R. 277, *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table).

In addition, the appellant knew her actions were wrong, and she was clearly on notice of the rules that were violated by her misconduct. *See Perrodin v. Department of Justice*, 55 M.S.P.R. 407, 413 (1992). Moreover, when the problem with her credit card was first brought to her attention by the agency, she assured the agency that the problem had been corrected, but additional credit charges were made after this time. Thus, the administrative judge correctly found the appellant had forfeited the agency's trust.

Finally, the appellant is not a good candidate for rehabilitation because she has not shown remorse for her misconduct. *See Dolezal v. Department of the Army*, 58 M.S.P.R. 64, 71 (1993), *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994). To the contrary, in order to explain away her misconduct and to avoid its consequences, the appellant presented the obviously manufactured, and uncorroborated, claim that she was suffering from depression, drinking heavily, and taking drugs during this one 30 day period in her life. The administrative judge clearly and persuasively analyzed this claim. He observed that the appellant's testimony concerning the alleged effects of her drinking was at great variance with that of her supervisors, who testified that they had had daily contact with the appellant and that they had never noticed any of the classic signs of a substance abuse problem, i.e., no

attendance problems, no appearance of impairment, no odor of alcohol on her breath, no poor performance, no incoherency in thought or expression, and no mood swings or changes from her normal behavior. Based on this evidence, the administrative judge correctly found that there was no showing that the appellant's alleged personal problems had led to or caused her misconduct.

The majority's opinion does not provide any substantial reasoning or logic for its decision to mitigate the penalty. The majority's refusal to properly apply *Douglas* represents a blatant violation of the principle that the Board will not substitute its judgment for that of the agency.

The penalty of removal should be affirmed.

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Nos. DE0752900226-B-2, DE0752900227-B-2
and DE0752900228-B-2

MERIT SYSTEMS PROTECTION BOARD

MICHAEL G. BARRETT, JEROME K. ROBERTS,
AND THOMAS J. WIGGINS, APPELLANTS

v.

DEPARTMENT OF THE INTERIOR, AGENCY

[Filed: Nov. 9, 1994]

Before: ERDREICH, Chairman, PARKS, Vice Chairman, and AMADOR, Member.

OPINION AND ORDER

The appellants have timely petitioned for review of the September 3, 1993 remand initial decision that sustained the agency's actions against them. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, and AFFIRM the initial decision as MODIFIED, still SUSTAINING the adverse action with regard to Wiggins, but MITIGATING the penalty with regard to Barrett and Roberts to a letter of reprimand.

BACKGROUND

The agency's actions against the appellants were based on allegations that: (1) On the afternoon of June 9, 1988, Barrett, Roberts, and another agency employee left duty in a government pickup truck to help build a fish pond in Wiggins' backyard and took agency equipment with them; (2) neither Barrett nor Roberts took leave for the time they were not on duty and both men subsequently denied knowledge of the event; (3) Wiggins did not charge his subordinates, Barrett and Roberts, and two other agency employees, Ray Ben and Dean Slim, with leave for the time they worked on the fish pond;[1] and (4) Wiggins falsified his own time and attendance report for the following Monday, June 13, 1988, by incorrectly indicating that he was at work. MSPB Docket No. DE07529010226, Initial Appeal File (IAF 1), Tab 3, Subtab 4h; MSPB Docket No. DE07529010227, Initial Appeal File (IAF 2), Tab 3, Subtab 4h; MSPB Docket No. DE07529010228, Initial Appeal File (IAF 3), Tab 3, Subtab 4j. As a result of this misconduct, the agency suspended Barrett and Roberts for 30 days and reduced both of them in grade based on the charges of: (1) Misrepresentation or concealment of a material fact in connection with an investigation; (2) failure to report an act of fraud, waste, and abuse; and (3) making a false claim on a time and attendance report. IAF 1, Tab 3, Subtabs 4a-4c, 4h; IAF 2, Tab 3, Subtabs 4a-4c, 4h. The agency reduced Barrett in grade from a GS-11 soil scientist to a GS-9 soil scientist, IAF 1,

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[1] At the time that the agency took the adverse actions against the appellants, neither Ben nor Slim were still employed by the agency. Thus, they were not charged with misconduct.

Tab 3, Subtab 4b, and reduced Roberts in grade from a GS-9 soil scientist to a GS-7 physical science technician, IAF 2, Tab 3, Subtab 4b. The agency removed Wiggins from his GS-12 supervisory physical scientist position based on the charges of: (1) Misuse of a government vehicle; (2) misuse of government equipment; (3) misuse of government employees; (4) falsification of government time and attendance reports; and (5) making a false claim on a time and attendance report. IAF 3, Tab 3, Subtabs 4a, 4b, 4j.

The appellants denied any misconduct and maintained that, although Wiggins was at his home during the afternoon of June 9, 1988, he was on annual leave, and that Roberts and Barrett were at work during the period in question. The appellants claimed that Wiggins was assisted by three friends and two day laborers, none of whom were agency employees.

To support the charges, the agency primarily relied on four witnesses: Ray Ben, Dean Slim, Stanley Etsitty, and Ronald Martin. Ben and Slim were agency employees at the time of the alleged misconduct and testified that they went to Wiggins' home, along with Barrett and Roberts, and helped build the fish pond. Hearing Transcript (HT) at 37-40, testimony of Ben; HT at 51-52, testimony of Slim. Etsitty, also a former agency employee, testified that he saw Roberts, Barrett, and Ben leave the agency facility in the government pickup truck. HT at 7-8. Martin, the driver of the cement truck that brought the cement for the fish pond, testified that he saw Roberts and Ben at Wiggins' home. He also testified that he saw a pickup truck with a United States Government license plate parked in front of Wiggins' home. HT at 69-71.

The appellants petitioned the Board for appeal of the agency's actions.[2] After affording the appellants the hearing that they requested, the administrative judge upheld all of the charges, except for the charge that Wiggins falsified his own time and attendance report for June 13, 1988, and sustained the actions. IAF 1, Tab 20; IAF 2, Tab 20; IAF 3, Tab 20. The appellants then petitioned for review of that initial decision.

In an Opinion and Order, the Board granted the appellants' petition for review, vacated the initial decision, remanded the appeal for additional fact findings, and directed the administrative judge to issue a new initial decision. *Barrett v. Department of the Interior*, 54 M.S.P.R. 356 (1992). In a remand initial decision, the administrative judge again upheld all of the charges, except for the false time and attendance report charge against Wiggins, and sustained the actions. MSPB Docket No. DE0752900226B1, Remand Initial Appeal File, Tab 12.

The appellants petitioned for review of that initial decision and the Board issued an Opinion and Order that granted the petition for review, vacated the initial decision, remanded the appeal for additional fact findings, and directed the administrative judge to issue a new initial decision. *Barrett v. Department of the Interior*, 57 M.S.P.R. 635 (1993). The administrative judge issued the instant initial decision in which he complied with the Board's remand instructions and

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[2] Because the issues raised in the appeals of all three appellants are very similar and are interrelated, the appeals were consolidated by the administrative judge during the original adjudication of the appeals. IAF 1, Tab 4; IAF 2, Tab 4; IAF 3, Tab 4; *see* 5 C.F.R. § 1201.36(a)(1). The agency requested that the appeals be consolidated, and none of the appellants objected.

again upheld all of the charges, except for the false time and attendance report charge against Wiggins, and sustained the actions. MSPB Docket No. DE0752900226-B-2, Remand Initial Appeal File, Tab 2, Remand Initial Decision (RID). The appellants have petitioned for review of the remand initial decision.

On review, the appellants argue that the administrative judge erred in his fact findings and credibility determinations in the remand initial decision. MSPB Docket No. DE0752900226-B-2, Petition for Review File (PFRF), Tab 1, Petition for Review (PFR). The agency has timely responded in opposition to the petition for review. PFRF, Tab 3.

ANALYSIS

The Board will not consider the appellants' reply to the agency's response to the petition for review.

The agency's response to the petition for review is styled as a "Cross Petition for Review," but it raises no allegations of error by the administrative judge in the remand initial decision and thus only constitutes a response to the petition for review. *Id.* In a notice acknowledging the agency's submission, the Clerk of the Board afforded the appellants 25 days to respond. PFRF, Tab 4. Because the agency's submission raises no allegations of error by the administrative judge, it should not have been treated as a cross petition for review and the appellants should not have been afforded the opportunity to respond to it. Thus, the record on review closed 25 days after the date of service of the petition for review. 5 C.F.R. § 1201.114(d), (i); PFRF, Tab 2. A party may not file additional evidence or argument after the close of the record on review unless the party shows that the

evidence was not readily available before the record closed. 5 C.F.R. § 1201.114(i).

We have not considered the appellants' reply to the agency's submission titled a "cross petition for review" which, as explained above, only constituted a response to the petition for review. *See* PFRF, Tab 5. Although an appellant has a right to reply to an agency's cross petition for review, there is no right to reply to an agency's response to a petition for review. *See* 5 C.F.R. § 1201.114(d), (i). Even though the appellants were inadvertently informed that they could file a reply to the agency's misnamed filing, the appellants are not disadvantaged by now having that reply disallowed because they had no right to file such a document.

The administrative judge made a number of errors in his fact findings and credibility determinations, but those errors do not constitute reversible error.

The Board will generally defer to an administrative judge's fact findings and credibility determinations and will not grant a petition for review based on a party's mere disagreement with those fact findings and credibility determinations. *Weaver v. Department of the Navy*, 2 MSPB 297, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). The Board is free, however, to substitute its own determinations of fact for those of an administrative judge, giving his findings only as much weight as may be warranted by the record and by the strength of his reasoning. *Id.* at 133. In making credibility determinations, the Board will consider a number of factors, including: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character;

(3) any prior inconsistent statement by the witness; (4) the witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; and (6) the inherent improbability of the witness's version of events. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

It is undisputed that Wiggins constructed a fish pond at his residence in June 1988 and that Eagle Readimix Concrete provided the concrete for the project during the afternoon of June 9, 1988. It is also undisputed that Wiggins was at his residence on annual leave at the time of the concrete pour. The dispositive issue in this appeal is whether appellants Barrett and Roberts and agency employees Ben and Slim were also present at Wiggins' residence at the time of the concrete pour and whether they used government equipment and a government pickup truck in the project.

The administrative judge mischaracterized the testimony of Kathleen Meech.

In his remand initial decision, the administrative judge found that the agency's chain of evidence began with the testimony of Kathleen Meech, co-owner of Eagle Readimix Concrete, that Roberts placed the order for the concrete. RID at 12; HT at 64. The administrative judge stated that, although Meech's testimony did not place Roberts at the concrete pour on June 9, 1988, it did directly contradict his written statement that he had no knowledge of the fish pond project. RID at 12; *see* IAF 2, Tab 3, Subtab 4p. On review, the appellants argue that the administrative judge mischaracterized Meech's testimony. PFR at 12. We agree. When asked on cross examination

whether she was sure if Roberts was the man who placed the concrete order, Meech responded that "[w]e'll, I'm going to have to say that I'm just—I'm guessing." HT at 66.

Thus, contrary to the administrative judge's finding, Meech did not identify Roberts as the individual who placed the concrete order, but rather "guessed" that he was the individual. In addition, at the hearing, the administrative judge interrupted the cross examination of Meech about her identification of Roberts and stated that who placed the order for concrete was not material. HT at 66-67. The administrative judge's error regarding Meech's testimony is not a basis to reverse the remand initial decision because he did not depend on Meech's identification of Roberts as the sole basis to support additional findings elsewhere in the remand initial decision. *See* RID at 14.

The administrative judge correctly characterized Martin's testimony and the testimony of another cement truck driver, and correctly found Martin credible.

The appellants also argue that the administrative judge mischaracterized the testimony of Martin and a second cement truck driver, Hector Estrada. PFR at 13-14. According to the appellants, the administrative judge failed to mention that Martin's testimony did not place Barrett and Slim at the concrete pour and that Estrada could only identify Wiggins as being at the concrete pour. *Id.*; *see* HT at 69-70, testimony of Martin, HT at 79-80, testimony of Estrada. The appellants also assert that the administrative judge erroneously stated that they offered no candidate for possible misidentification by Martin when in fact they suggested that Martin confused K.C. Liggins, a

friend of Wiggins who allegedly assisted in the project, for Roberts. PFR at 13-14.

We believe that the administrative judge correctly characterized Martin's testimony and that the administrative judge's failure to mention every aspect, limitation, or inconsistency in Martin's and Estrada's testimony does not mean that he did not fully consider the testimony. *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), aff'd, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141, 106 S.Ct. 2247, 90 L.Ed.2d 693 (1986). The administrative judge did, however, misstate that the appellants offered no candidates for possible misidentification by Martin. RID at 12. As correctly argued by the appellants on review, they contended below that Martin confused Liggins for Roberts. The record reflects, however, that Martin testified that Roberts was present at Wiggins' home on June 9, 1988, and that he remembered the concrete delivery because of an incident with Wiggins' check and his driver's license. HT at 72-73. In addition, we find Martin's testimony about the white license plate on a pickup truck parked in front of Wiggins' home particularly compelling. HT at 71. The administrative judge correctly noted that New Mexico license plates are yellow with red letters and that U.S. Government license plates are white. RID at 4.

As also found by the administrative judge, there is no reason for Martin to fabricate his testimony and his testimony was straightforward and convincing. *See* RID at 8; *see also Hillen*, 35 M.S.P.R. at 458. Thus, we find his testimony credible.

The administrative judge considered the testimony of Etsitty, Slim, and Ben and correctly concluded that their testimony was credible.

The appellants also argue on review that the administrative judge failed to consider bias against the appellants by Etsitty, Slim, and Ben. PFR at 15-17. The administrative judge considered the allegations of bias and concluded that the appellants failed to show that Etsitty, Slim, and Ben had a motive to give false testimony. RID at 13. As found by the administrative judge, as former employees of the agency, the three witnesses were potentially adversely affecting their future employment opportunities with the agency by their admissions of participation in the fish pond project during duty hours. *Id.* We agree with this assessment, at least with regard to Ben and Slim, who testified that they participated in the fish pond project. HT at 37-39, testimony of Ben; HT at 50-51, testimony of Slim. Ben's and Slim's testimony is compelling because it was contrary to their interests to admit involvement in misconduct and thus they would have little motivation to fabricate. *See Hillen*, 35 M.S.P.R. at 458. With regard to Etsitty, we acknowledge that he grieved a performance rating from Wiggins and that he apparently had at least one work-related disagreement with Barrett, but as found by the administrative judge, the appellants failed to show that he was biased against them. RID at 13.

The appellants also assert that the administrative judge failed to consider Ben's inconsistent statements. PFR at 23-24. According to the appellants, Ben originally denied any knowledge of the construction of a fish pond, but later, when he allegedly

sought reemployment by the agency, he remembered the events in question. *Id.* The administrative judge considered the possibility that Ben, Slim, and Etsitty fabricated their testimony in an effort to gain reemployment by the agency but, as discussed above, he found that not to be the case. RID at 13. We believe that it is more likely that Ben initially denied knowledge of the fish pond project in order to protect himself and subsequently decided to reveal the truth.

The appellants also argue that the administrative judge failed to address a number of inconsistencies in the testimony of key agency witnesses and failed to address inconsistencies in the statements, deposition, and hearing testimony of the individual witnesses. PFR at 17-21. For example, Etsitty testified that he watched Roberts depart from the agency facility in the agency pickup truck on his way to the concrete pour and that Barrett was on the passenger side of the seat and Ben was in the middle. HT at 8. In contrast, Ben initially testified that Roberts was on the passenger side, but later testified that Barrett was on the passenger side. HT at 38, 43-44. Similarly, Etsitty contended in his initial statement that he helped "load shovels, hammers, and power tools" into the pickup truck, but at the hearing he testified that he loaded shovels, picks, and trowels into the pickup truck.[3] IAF 3, Tab 3, Subtab 4o; HT at 13. Ben testified, however, that there were only a couple of shovels in the back of the pickup truck. HT at 38.

[3] To the extent that the appellants refer to Etsitty's deposition in their petition for review, we have previously held that we will not consider it under 5 C.F.R. § 1201.115. *Barrett*, 57 M.S.P.R. at 638 n. 5.

Although the administrative judge did not mention every inconsistency in the statements and hearing testimony of Etsitty, Slim, and Ben, the administrative judge discussed several of the inconsistencies and found that they did not affect the credibility of the three witnesses. RID at 13. The fact that the administrative judge did not mention every inconsistency does not mean that he did not fully consider all of the evidence. *Marques*, 22 M.S.P.R. at 132. In any event, we have fully considered the inconsistencies cited above and all of the other inconsistencies cited by the appellants in their petition for review and find that the appellants have failed to show that the administrative judge erred in his fact findings.

The appellants also argue that the administrative judge failed to consider that Etsitty admitted that he had no independent recollection of the date of the concrete pour and that he only remembered the exact date after the agency representative informed him of it. PFR at 22-23. Although the appellants' assertion is true, the fact that Etsitty had no independent recollection of the date on which the concrete pour occurred does not reduce the probative value of his testimony regarding the events on the date of the concrete pour.

Thus, we believe that the administrative judge correctly found the testimony of Etsitty, Ben, and Slim credible. *See Hillen*, 35 M.S.P.R. at 458. Although there may be some inconsistency regarding the details, they provided consistent testimony regarding the core issues in this appeal. That testimony is also consistent with Martin's testimony.

The administrative judge correctly found Liggins and Moser not credible.

On review, the appellants also argue that the administrative judge erred in his credibility determinations regarding Liggins and another friend of Wiggins who allegedly assisted in the fish pond project, John Moser. PFR at 24-27. Liggins testified that he helped Wiggins with the fish pond project for 4 days, Friday through Monday. HT at 207-08. He testified that he helped set the forms for the fish pond and that "on that weekend we poured cement for it, and the following Monday we finished up." HT at 207. Subsequently, however, Liggins testified that during the week the work on the fish pond required hammers and hand saws and that, on Friday, Wiggins was assisted by himself, two day laborers, and individuals named John and Andy. HT at 208. Liggins testified that he did not know Barrett and that Barrett was not present at any time, and that he knew Roberts and Slim and that they were not present on either day. HT at 209-10.

Moser testified that he helped dig the hole for the fish pond and helped pour the cement for the fish pond approximately a week later. HT at 153. He testified that Wiggins was assisted in pouring the cement by Liggins, an individual named Andy, and two day laborers. *Id.* Moser also testified that neither Roberts nor Barrett was present at the cement pour and that he did not know Ray Ben. HT at 153-55.

The administrative judge discredited Liggin's testimony because he testified that he completed the cement forms over the weekend and that the cement was poured on a Monday. RID at 9. The evidence reflects that the cement was poured on a Thursday.

With regard to Moser's testimony, the administrative judge discredited it because the appellants did not offer Moser as an exculpatory witness until the time of the first hearing and they did not identify him as a source of evidence in their reply to the notice of proposed removal or in their petitions for appeal. RID at 9. The administrative judge also noted that both Liggins and Moser admitted that they were longtime friends of Wiggins. *Id.*; HT at 151-52, testimony of Moser; HT 206-07, testimony of Liggins.

With regard to Liggins, we note that the administrative judge correctly discredited his testimony because of the inconsistencies in his testimony regarding the day of the week of the cement pour. Liggins' misstatement about the date of the cement pour is not a minor error, such as stating the cement was poured on Wednesday or stating that it occurred on June 8, 1988, but rather goes to the heart of his version of how the project was done and calls his credibility into question. In addition, as noted by the administrative judge, Liggins is a personal friend of Wiggins. RID at 9. Finally, to believe Liggins' version of events, it is necessary to reject the credible and consistent testimony of Etsitty, Ben, Slim, and Martin. *See Hillen*, 35 M.S.P.R. at 458.

After reviewing Moser's testimony, the administrative judge's findings regarding this testimony, and the appellants' assertions on review, we find that the administrative judge's reasoning in discrediting Moser's testimony was faulty. *See* RID at 9; PFR at 24-27. We find that the fact that the appellants did not offer Moser as a witness before the agency or in their petitions for appeal is not a proper basis to discredit his testimony in these appeals. The point in time at which a witness is first presented for consideration is

not, by itself, an appropriate basis by which to determine credibility. *See Hillen*, 35 M.S.P.R. at 458.

Based on the other evidence in the record, however, we believe that the administrative judge correctly discredited Moser's testimony. As noted by the administrative judge, Moser is a personal friend of Wiggins and, more importantly, to believe his version of events, it is necessary to reject the credible and consistent testimony of Etsitty, Ben, Slim, and Martin. *See Hillen*, 35 M.S.P.R. at 458.

The administrative judge correctly found the appellants' testimony not credible.

The appellants also argue on review that the administrative judge erred in not properly considering their testimony, particularly in light of their combined 38 years of agency employment, their good work records, their positions of authority, and the fact that Roberts and Barrett are still employed by the agency. PFR at 28-29. Contrary to the appellants' assertions, the administrative judge considered the appellants' testimony and simply found them not credible. RID at 6, 10. With regard to the specific factors cited by the appellants on review, they are irrelevant to a valid credibility determination. *See Hillen*, 35 M.S.P.R. at 458.

The appellants also argue that the administrative judge failed to consider the documentary and testimonial evidence that showed that Roberts and Barrett were at work on June 9, 1988. PFR at 29-32. The administrative judge fully considered this evidence and concluded that it did not support the appellants' version of events. RID at 10-11. Similarly, the administrative judge fully considered the significance of the pickup truck mileage log and

concluded that it did not support the appellants' version of events. RID at 11. The appellants' allegations on review constitute mere disagreement with the administrative judge's explained fact findings. With regard to the appellants' claim that it is inherently unlikely that Barrett and Roberts would have the foresight to falsify the laboratory report and vehicle mileage log more than a year in advance of any disciplinary action, we note that it is not uncommon for individuals to cover up evidence of their wrongdoing.

The administrative judge correctly sustained four of the charges against Wiggins and one of the charges against Barrett and Roberts.

Based on the discussion above, we find that the administrative judge correctly sustained the charges that Wiggins misused a government vehicle, misused government equipment, and misused government employees. RID at 15-16. We also find that the administrative judge correctly sustained the charge that Wiggins falsified government time and attendance reports by representing that his subordinates were on duty when they were assisting with the cement pour. RID at 16. The administrative judge did not sustain the final charge against Wiggins of making a false claim on his own time and attendance report, RID at 2 n. 1, and the agency has not petitioned for review of that finding. Thus, we will not consider the charge further. We also find that the administrative judge correctly found that Barrett and Roberts made a false claim on their respective time and attendance reports when they represented that they were on duty during the time period that they were assisting with the cement pour. RID at 17.

With regard to the charge that Barrett and Roberts misrepresented or concealed a material fact in connection with an agency investigation, the agency alleged that, when the area personnel officer inquired about the misconduct, Barrett and Roberts provided false information. IAF 1, Tab 3, Subtab 4h; IAF 2, Tab 3, Subtab 4h. According to the agency, Roberts stated in response to the inquiry that he did not remember anything about the building of a fish pond, while Barrett stated that he only worked on the fish pond on his own time. IAF 1, Tab 3, Subtab 4h; IAF 2, Tab 3, Subtab 4h. The agency also charged that Barrett and Roberts failed to report an act of fraud, waste, and abuse when they failed to disclose to agency officials that Wiggins did not charge them leave for the time that they worked on the fish pond. IAF 1, Tab 3, Subtab 4h; IAF 2, Tab 3, Subtab 4h. The administrative judge sustained these charges. RID at 16-17.

After the remand initial decision was issued, the Board issued *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994). In *Walsh*, 62 M.S.P.R. at 594, we recognized that the Board had previously held, as did the administrative judge in this appeal, that an agency may separately charge an employee with misconduct and with making false statements about the alleged misconduct, when the falsification concerns a matter of official interest to the agency. We determined in Walsh, however, that these holdings were based on a faulty analysis of the decision of the U.S. Court of Appeals for the Federal Circuit in *Grubka* v. *Department of the Treasury*, 858 F.2d 1570, 1574-75 (Fed. Cir. 1988), holding that such a charge was erroneous as a matter of law. We therefore held, following *Grubka*, that an agency may not separately charge an employee with misconduct

and with making false statements regarding the alleged misconduct. *Walsh*, 62 M.S.P.R. at 594-95.

Thus, in these appeals, based on our decision in Walsh, we find that the agency's charge against Barrett and Roberts of misrepresentation or concealment of a material fact in connection with an investigation is improper, and the administrative judge erred as a matter of law by sustaining them. *Id.*, at 595. With regard to the charge that Barrett and Roberts failed to report an act of fraud, waste, and abuse by Wiggins, that charge means that Barrett and Roberts were required to report Wiggins' misconduct of not charging them leave for the time during which they worked on the fish pond during duty hours. Such a disclosure, however, would have necessitated implicating themselves in the misconduct of filing a false time and attendance report. A charge based on such a requirement of self-implication is contrary to our decision in *Walsh*, and thus the administrative judge erred as matter of law by sustaining the charge that Barrett and Roberts failed to report such an act of fraud, waste, and abuse.[4] *Id.*, at 595.

Although not cited by the agency, we note that 5 C.F.R. § 2635.101(b)(11) sets forth the ethical requirement that Federal employees "shall disclose waste, fraud, abuse, and corruption to appropriate authorities." We discern nothing in the regulation, however, that calls into question the discussion above and the Board's holding in Walsh regarding self-implication. Accordingly, we find that, despite the requirement of 5 C.F.R. § 2635.101(b)(11), an employee cannot be

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[4] Our holding in no way precludes an agency from bringing a charge of engaging in waste, fraud, and abuse, or similar charges under other circumstances.

required to make a disclosure that would implicate himself or herself in wrongdoing. *See Walsh*, 62 M.S.P.R. at 595; *see also Walsh, concurring opinion of Chairman Erdreich*, at 599 (stating that the charge of making false statements in an agency investigation must be set aside as inconsistent with Federal Circuit precedent despite statutory and regulatory admonitions requiring truthfulness of Federal employees).

The penalty imposed by the agency against Wiggins was within the tolerable limits of reasonableness.

The administrative judge considered the penalty imposed by the agency against Wiggins in light of the fact that he did not sustain all of the charges. RID at 19-20. The administrative judge determined that removal was within the tolerable limits of reasonableness for Wiggins' misconduct. RID at 17-20. We have considered the arguments on review, and find that the administrative judge did not err in his determination.

The maximum reasonable penalty for the sustained misconduct of Barrett and Roberts is a letter of reprimand.

Regarding the penalties imposed against Barrett and Roberts, when not all of the charges are sustained, the Board will consider carefully whether the sustained charges merit the penalty imposed by the agency. *McIntire v. Federal Emergency Management Agency*, 55 M.S.P.R. 578, 588 (1992); *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 308 (1981). In *Douglas*, 5 M.S.P.R. at 305, the Board articulated a number of factors to consider in determining the appropriateness of a penalty.

Here, Barrett and Roberts engaged in misconduct by falsely claiming on their time and attendance reports that they were at work while assisting Wiggins with the fish pond. The Board has held that the falsification of a time and attendance report is a serious offense that can warrant removal. *See Rohn v. Department of the Army*, 30 M.S.P.R. 157, 158-59 (1986). Whether a particular act of falsification warrants removal must be determined in light of the circumstances of each case. *Perez v. U.S. Postal Service*, 48 M.S.P.R. 354, 356-57 (1991).

In these appeals, we find that there are a number of facts that support a lesser penalty than the demotions and suspensions imposed by the agency. The length of time involved is only 2 hours and, because Barrett and Roberts spent the time working at their supervisor's residence, we cannot find that they acted for personal gain. Also, they acted with the knowledge and approval of their supervisor. In addition, the agency cited no prior disciplinary actions against either Barrett or Roberts and, at the time of the agency's actions, Barrett had approximately 18 years of service with the agency and approximately 24 years of Federal service, and Roberts had 4 years of service with the agency and nearly 7 years of Federal service.

Accordingly, in light of all of the circumstances in these appeals, we find that a letter of reprimand is the maximum reasonable penalty for the sustained misconduct of Barrett and Roberts. This finding is consistent with the finding in *Coppola v. U.S. Postal Service*, 47 M.S.P.R. 307, 315, 319 (1991), where the Board held that a letter of reprimand was the maximum reasonable penalty for a single instance of 32 to 37 minutes of absence without leave.

ORDER

We ORDER the agency to cancel the demotions and suspensions of Barrett and Roberts and to replace those actions with a letter of reprimand. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish these actions within 20 days of the date of this decision.

We also ORDER the agency to issue checks to Barrett and Roberts for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER Barrett and Roberts to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue checks to Barrett and Roberts for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform Barrett and Roberts in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, Barrett and Roberts should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, Barrett and Roberts may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why Barrett and Roberts believe that there is insufficient compliance,

and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

Member Amador issues an opinion concurring in part and dissenting in part.

For the Board:

ROBERT E. TAYLOR,

WASHINGTON, D.C.

SEPARATE OPINION OF MEMBER ANTONIO C. AMADOR.

Although I concur in all other aspects of the Board's decision, I respectfully dissent from the majority's mitigation of the penalty to be imposed upon Barrett and Roberts. I agree that, in light of the

Board's reversal of three of the four charges against Barrett and Roberts, the agency-imposed penalty should be mitigated. However, I believe that a mere reprimand is an entirely inappropriate and unreasonable penalty in light of the seriousness of the sustained charges of falsification of time and attendance reports. Moreover, it is entirely inconsistent with the Board's treatment of falsification cases in the past. A 30-day suspension, at a minimum, would be more appropriate and would meet the Board's responsibility to bring the penalty within the parameters of reasonableness. *Montalvo v. U.S. Postal Service*, 50 M.S.P.R. 48, 51 (1991).

In this case, there are aggravating factors which must be considered in tandem with the mitigating factors noted by the majority. The Board is unanimously sustaining the removal of Wiggins for misusing a government vehicle, government equipment, and government employees. It is thus inappropriate, in determining the appropriate penalty to impose on Barrett and Roberts, to overlook the Board's conclusion that the two were willing participants in an act of fraud, waste, and abuse, having driven a government pickup truck with government equipment to Wiggins' house, and having falsified their duty logs and the truck's mileage log to conceal their actions.

I agree that, in the context of this case, Barrett and Roberts cannot be charged with failing to come forward to report this fraud, waste, and abuse, as such a report would have placed them in the position of disclosing their own misconduct. *See* maj. at 201-202. However, their willing participation in the underlying misconduct should certainly be considered in determining the reasonableness of the penalty. This case is, therefore, quite distinguishable from *Coppola*

v. U.S. Postal Service, 47 M.S.P.R. 307 (1991), wherein Coppola extended his lunch hour by 32 to 37 minutes on one occasion. By contrast, not only were Barrett and Roberts absent from duty, an absence covered up with false time and attendance report claims, but *additionally*, during that brief absence, they were willing participants in several counts of fraud, waste, and abuse. Although the amount of time that they were absent from work was brief, this is not a mere absence-without-leave case, and it is quite incredible that the majority treats it as such. Barrett's and Roberts' unauthorized absence, which they attempted to cover up by falsifying their time and attendance reports, was attributable to their participation in illegal activity.

The majority opinion makes note of the fact that Barrett and Roberts were doing personal work for their supervisor with his knowledge and approval as support for mitigation to a reprimand. However, this personal work involved misutilization of government equipment and a government vehicle, as well as the involvement of other employees who, along with the appellants, were charging their "personal work" to the government. The appellants clearly knew that this "personal work" was not authorized—they attempted to cover their tracks by falsifying the daily log and the truck mileage log. Moreover, it is of little relevance that they were acting with the knowledge and approval of their supervisor; such circumstances would not excuse shoplifting or bank robbery!

As the majority opinion acknowledges, the Board has held that the penalty of removal may be appropriate in falsification cases, depending on the facts of the individual case. See maj. at 202. The substance of a falsification charge is the issue of an employee's

honesty. *Beardsley v. Department of Defense*, 55 M.S.P.R. 504, 511 (1992), *aff'd*, 5 F.3d 1504 (Fed. Cir. 1993) (Table). An employee's falsification of an agency document goes to the core of the employer-employee relationship and impeaches the employee's reliability, veracity, trustworthiness, and ethical conduct. *Wier v. Department of the Army*, 54 M.S.P.R. 348, 354 (1992); *Hanna v. Department of the Army*, 42 M.S.P.R. 233, 240 (1989). On more than one occasion, the Board has held that *removal* for falsification of government documents promotes the efficiency of the service because such falsification raises serious doubts regarding the employee's honesty and fitness for employment. *See Hamilton v. Department of the Air Force*, 52 M.S.P.R. 45, 47 (1991), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table); *see also Kuhn v. Federal Deposit Insurance Corporation*, 48 M.S.P.R. 393, 398-99 (1991) (removal was within the tolerable limits of reasonableness where the offense of intentional submission of an incorrect travel voucher raised serious doubts as to the employee's trustworthiness and reliability), *aff'd*, 954 F.2d 734 (Fed. Cir. 1992) (Table); *Gonzalez v. U.S. Postal Service*, 30 M.S.P.R. 82, 85-86 (1986) (where the Board failed to sustain the charges of lying to postal investigators and failure to cooperate in a postal investigation, the charge of filing a false travel voucher and supporting documentation was sufficient to warrant removal due to the irretrievable loss of trust and confidence in the employee's integrity, veracity, and value as a government witness), *aff'd*, 818 F.2d 874 (Fed. Cir. 1987) (Table); *Trybul v. Department of the Army*, 22 M.S.P.R. 290, 292 (1984), *aff'd*, 776 F.2d 1059 (Fed. Cir. 1985) (Table); *Martinez v. Department of Defense*, 21 M.S.P.R. 556, 558 (1984) (removal penalty sustained,

despite the de minimis amount of money involved in the false travel vouchers and the employee's long-standing successful service, where the agency demonstrated that the falsification of a travel voucher directly related to employee's performance of his official duties and had a negative effect upon his supervisor's confidence in him and ability to trust him), *aff'd*, 765 F.2d 158 (Fed. Cir. 1985) (Table); *Stokes v. Department of Agriculture*, 9 MSPB 22, 9 M.S.P.R. 372, 376 (1982) (the Board sustained the removal of the employee for falsification of a travel voucher and supporting documents); Initial Decision at 7.

Recently, in *Tanner v. Department of Transportation*, 65 M.S.P.R. 169 (1994) (Chairman Erdreich dissenting), the Board similarly reversed a charge of misrepresentation, per *Walsh*, but upheld the penalty of removal in a case involving a falsification of a travel voucher. As in the instant case, the appellant's falsification of records raised serious concerns about her judgment, reliability, veracity, trustworthiness, and ethical conduct. Maj. at 194. In another recent decision, *Wier*, 54 M.S.P.R. at 354-55, the Board found that a 30-day suspension was a reasonable penalty for an employee's filing of a false travel voucher, despite a number of mitigating factors. In *Hart v. U.S. Postal Service*, 53 M.S.P.R. 228, 231-32 (1992), the Board mitigated a 60-day suspension to a 30-day suspension for the employee's falsification of his time and attendance report by 1 hour. In *Parsons v. Department of the Air Force*, 21 M.S.P.R. 438, 446 (1984), the Board mitigated a removal to a 45-day suspension for falsifying a sick leave form and for being absent without leave for a day.

Certainly, the actions of Barrett and Roberts with regard to the "fish pond" incident were no less serious then the offenses of Wier, Hart, and Parsons (Tanner's falsification was more serious, due to her supervisory position). Thus, in light of the specific circumstances of this case, a similar substantial penalty in the form of a suspension is appropriate.

The Board majority's decision to instead mitigate the penalty to a mere reprimand illustrates, once again, the current Board's general disregard for its own precedent (which the majority decision consciously ignores, citing only the *Coppola* decision as support for its mitigation of the penalty to a reprimand; as noted above, the *Coppola* case involved a far less serious offense than the instant case), its willing usurpation of the agency's role in determining the appropriate penalty, and the current Board's arbitrariness and inconsistency in reviewing the agency's selection of a penalty (indeed, this inconsistency is demonstrated by the removal penalty imposed upon Wiggins, in contrast to the reprimands applied to his accomplices). Accordingly, I strongly dissent from this aspect of the Board majority's decision.

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PORTECTION BOARD

No. AT-0752-94-0313-I-1

HARRY R. MCMANUS, APPELLANT

v.

DEPARTMENT OF JUSTICE, AGENCY

MERIT SYSTEMS PROTECTION BOARD

[Filed: Feb. 17, 1995]

Before: ERDREICH, Chairman, PARKS, Vice Chairman, and AMADOR, Member.

OPINION AND ORDER

The agency has petitioned for review of an initial decision that mitigated the appellant's demotion to a 14-day suspension. For the reasons set forth below, we DENY the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.117, and AFFIRM the initial decision AS MODIFIED by the Opinion and Order, stili MITIGATING the appellant's demotion to a 14-day suspension.

BACKGROUND

The appellant petitioned for appeal from the agency's action demoting him from the position of Supervisory Correctional Officer, GS-11, step 3, to the position of Correctional Officer, GS-8, step 10. *See* Initial Appeal File (IAF), Tab 1; Tab 4, Subtab 4a. The agency based its action on charges of conduct unbecoming a supervisor and making false statements during an official investigation. *See id.*, Tab 4, Subtabs 4b, 4g.

Concerning the former charge, the agency asserted that the appellant had admitted during an interview "to making various sexual innuendoes to a female subordinate." *See id.*, Tab 4, Subtab 4g. The record of that interview shows that he admitted having engaged in a conversation with the subordinate (Officer White) in which he referred to "a bra size;" asked her about her preferred sexual positions; told her he had a "bulge" in his pants thinking about the subject; and "made a reference to the effect of 'Can you see how much you excite me?'" when talking to Officer White. *See id.*, Tab 4, Subtab 4l. Regarding its other charge, the agency produced a sworn statement from the appellant admitting that he had lied during another investigative interview regarding these comments. *See id.*, Tab 4, Subtab 4m.

The appellant waived his right to a hearing, so the case was decided based upon the written record. *See id.*, Tab 1; Initial Decision (I.D.) at 1-2. The administrative judge sustained both charges. He found that the appellant had made sexual comments to Officer White. *See* I.D. at 2-3. The administrative judge also concluded that the appellant had submitted a statement during an investigation denying that he had

made such remarks with the intent to deceive the agency. *See id.* at 3-5.

Nevertheless, he mitigated the demotion to a 14-day suspension. *See id.* at 6-7. The administrative judge conceded that, under the agency's table of penalties, a charge of conduct unbecoming would warrant a penalty ranging from official reprimand to removal. *See id.* at 6, citing IAF, Tab 4, Subtab 4q. He found, however, that joking sexual conversations were common in the workplace and that Officer White often participated in or initiated them. *See id.* at 3 n. 2, 7, citing IAF, Tab 4, Subtabs 4e, 4n. He concluded regarding the comments at issue that "[t]he agency's penalty may have been warranted had the comments been totally unwelcome and not mutually exchanged between the appellant and Officer White, but such was not the case here." *See id.* at 6-7 (emphasis in original). He also noted that the appellant had eleven years of service with the agency without prior discipline. *See id.* at 7. For those reasons, the administrative judge mitigated the agency's penalty selection. *See id.* The agency has petitioned for review of the initial decision, contending that the administrative judge erred in mitigating the penalty. *See* Petition for Review File (PFRF), Tab 1.

ANALYSIS

When the administrative judge issued his initial decision, he did not have the benefit of the Board's decision in *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586, 593-96 (1994). Relying on the court's decision in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-75 (Fed. Cir. 1988), the Board held that an agency may not charge an employee with misconduct and separately charge her with making a

false statement regarding the alleged misconduct. *See Walsh*, 62 M.S.P.R. at 593-96. As discussed above, the agency charged the appellant here with conduct unbecoming a supervisor and with making false statements concerning that conduct. *See* IAF, Tab 4, Subtab 4g. In accordance with *Walsh*, then, the latter charge was improper and may not be considered. *See* 62 M.S.P.R. at 595-96. When the Board does not sustain all of the agency's charges and specifications, we must carefully consider whether the sustained misconduct merits the penalty imposed by the agency. *See Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 308 (1981). In doing so, we analyze whether the agency conscientiously considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See id.*, 5 M.S.P.R. at 306.

Regarding the penalty issue, the agency asserts that the false statement made by the appellant regarding his comments to Officer White should be considered for the purpose of impeaching his credibility. It contends that the Board should therefore credit Officer White's account over the appellant's and determine that she was not a willing participant in conversations of a sexual nature with the appellant. On that basis, the agency argues, mitigation of the penalty is not warranted. *See* PFRF, Tab 1 at 6-7. In *Walsh*, however, the Board held that a false denial of misconduct cannot result in harm to the accused and that an appellant's false statements thus may not be considered in determining the penalty. *See* 62 M.S.P.R. at 595-96. We therefore reject the agency's argument and decline to consider the appellant's false statement in analyzing the penalty issue.

The record contains a statement by the appellant that sexual joking and innuendo were common in the workplace and that Officer White had a practice of engaging in sexually explicit conversations; he also maintained that her complaint about his comments to her had been motivated by her unhappiness about his criticism of her work performance. *See* IAF, Tab 4, Subtab 4e-1. Nothing in the record specifically contradicts the remarks about the office environment and Officer White's alleged practice. A statement by another employee asserted that Officer White had been a willing participant in sexually explicit conversations and had engaged in sexually provocative behavior. *See id.*, Tab 4, Subtab 4f. Moreover, Officer White admitted that she had initially participated in sex-related joking with the appellant, although she also alleged that she had later become uncomfortable with the joking and had told him that he could get in trouble for making such comments; she contended that she had then told him (apparently after the comments at issue had been made) that he should leave her alone. *See id.*, Tab 4, Subtab 4n-12. The appellant, however, has consistently denied that Officer White ever specifically discouraged his remarks. *See id.*, Tab 4, Subtabs 4e-1, 4i, 4l, 4n-3. The record also does not contain any first-hand accounts by other individuals confirming Officer White's account of this matter. In addition, another statement in the record by Officer White provides some support for the appellant's assertion that she was angry about his criticism of her work performance. *See id.*, Tab 4, Subtab 4n-11.

Based on our review of the record, then, it appears undisputed that sexual joking and innuendo did occur in the workplace and that Officer White willingly par-

ticipated in at least some of that activity. The agency nonetheless argues that the appellant's misconduct was highly serious, especially for a supervisory employee in a correctional facility, and that the existence of an atmosphere in which Officer White and others made sex-related jokes and comments is therefore irrelevant to the penalty issue. *See* PFRF, Tab 1 at 2-5. As an initial matter, we certainly agree that the appellant's comments were improper. Supervisors are held to a higher standard of conduct than other employees, and they have a responsibility to ensure that the work environment is free of offensive comments of a sexual nature. *See Kirk v. Department of the Navy*, 58 M.S.P.R. 663, 671-72 (1993); *Jackson v. U.S. Postal Service*, 48 M.S.P.R. 472, 476 (1991). Moreover, correctional officers must conform to a higher standard of conduct than non-law enforcement employees, and the Department of Justice is permitted wide discretion in controlling the work-related conduct of those employees charged with maintaining the integrity of our prison system. *See Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990).

Contrary to the agency's argument, however, see PFRF, Tab 1 at 5, we have not held that the office environment is irrelevant to the penalty issue in cases like this one. The holding cited by the agency states that an office atmosphere of sexual joking and innuendo would not be considered on the issue of whether the charge of conduct unbecoming a supervisor/sexual harassment could be sustained; that holding did not address the issue of whether the penalty imposed was reasonable. *See Lowe v. Department of Justice*, 63 M.S.P.R. 73, 76-77 (1994). Moreover, in analyzing whether mitigation was warranted

in cases involving sexual misconduct, the Board has explicitly considered whether an office atmosphere of sexual joking existed and whether the misconduct at issue fell within the bounds of such an atmosphere or surpassed it. *See Jordan v. U.S. Postal Service*, 44 M.S.P.R. 225, 232-33 (1990), *reconsideration denied*, 49 M.S.P.R. 544 (1991); *Vaughan* v. *Department of the Navy*, 40 M.S.P.R. 411, 417-13 (1989). We therefore reject the agency's argument that this issue may not be considered in reviewing the penalty issue.

As the administrative judge noted, the appellant had 11 years of service with the agency and does not appear to have been disciplined during that period. *See* I.D. at 7; IAF, Tab 4, Subtab 4a. Moreover, the sexual misconduct discussed above did not involve any physical contact with Officer White. *See Alsedek v. Department of the Army*, 58 M.S.P.R. 229, 241 (1993) (physical contact in sexual misconduct cases is an aggravating factor which may warrant a more severe penalty than might otherwise be imposed). Finally, it appears that the appellant's sexual comments to Officer White were made in an environment in which such remarks were common and in which Officer White also participated. *See Jordan*, 44 M.S.P.R. at 232-33; *Vaughan*, 40 M.S.P.R. at 417-18. Therefore, even after considering the undisputed seriousness of the appellant's misconduct, we find that the administrative judge did not err in mitigating his demotion to a 14-day suspension.

ORDER

We ORDER the agency to cancel the appellant's demotion and to substitute a 14-day suspension without pay, retroactive to the effective date of the demotion, January 9, 1994. *See Kerr v. National Endow-*

ment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board:

ROBERT E. TAYLOR,

WASHINGTON, D.C.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-3028

JAMES B. KING, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

v.

HARRY R. MCMANUS, RESPONDENT
AND
MERIT SYSTEMS PROTECTION BOARD
RESPONDENT

ORDER

[Filed: Nov. 4, 1996]

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 12, 1996.

Dated: November 4, 1996

FOR THE COURT,
MELVIN L. HALPERN, ACTING CLERK

By \s\ BRIAN P. LEDUC
BRIAN P. LEDUC
Associate Chief Deputy Clerk

cc: TODD M. HUGHES
MARTHA B. SCHNEIDER

KING V MCMANUS, 96-3028
(MSPB - AT0752940313R-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a record.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 95-3745, -3746

JAMES B. KING, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT
PETITIONER

v.

LESTER E. ERICKSON, JR., RESPONDENT
AND
JEANETTE M. WALSH, RESPONDENT
AND
MICHAEL G. BARRETT AND JEROME K. ROBERTS
RESPONDENTS
AND
SHARON KYE, RESPONDENT
AND
MERIT SYSTEMS PROTECTION BOARD
RESPONDENT

ORDER

[Filed: Nov. 4, 1996]

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and response thereto having been invited by the court and filed by two RESPONDENTS, and the petition for rehearing having been referred to the

panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 12, 1996.

Dated: November 4, 1996

FOR THE COURT,
MELVIN L. HALPERN, ACTING CLERK

By \s\ BRIAN P. LEDUC
BRIAN P. LEDUC
Associate Chief Deputy Clerk

cc: TODD M. HUGHES
J. EUCHLER, P. MARTH, H. BEST, J. KOCH

MARTHA B. SCHNEIDER

KING V ERICKSON, 95-3745, -3746
(MSPB - DA0752930295R-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.